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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ORIGINAL

No. _____

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER THE STATE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE ESSENTIAL ELEMENTS OF MALICE AND INTENT, AN INSTRUCTION VIRTUALLY IDENTICAL TO THE ONE CONDEMNED BY THIS COURT IN FRANCIS v. FRANKLIN, ___ U.S. ___, 105 S.Ct. 1965 (1985), IMPROPERLY SHIFTED THE BURDEN OF PROOF OF THESE ELEMENTS FROM THE STATE. UNDER THE STANDARD ESTABLISHED BY THIS COURT IN ROSE v. CLARK, ___ U.S. ___, 106 S.Ct. 3101 (1986), THIS FRANKLIN ERROR WAS NOT HARMLESS.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

(B) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN LAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,	*	
Petitioner,	*	
v.	*	No. 86- _____
RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Christopher Burger, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Burger v. Kemp, 785 F.2d 890 (1986). Christopher Burger is currently under sentence of death in the State of Georgia.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on March 13, 1986, is reported at 785 F.2d 890. A copy of the Eleventh Circuit slip opinion is attached as Appendix A. Rehearing en banc was denied by the Court of Appeals on July 23, 1986. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered March 13, 1986, rehearing and rehearing en banc denied July 23, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE[1]

A. Course of Proceedings

Seventeen (17) year old Christopher Burger, who had no prior criminal record, was convicted of one count of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E. 2d 834 (1978).

On retrial, Christopher Burger was sentenced to death on July 19, 1979. The death sentence was affirmed by the Supreme Court of Georgia. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

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1. References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided will be designated "T Trial"; references to Petitioner's second trial where sentence was decided will be designated "T Sent. Trial"; references to the evidentiary hearing held in the habeas corpus proceedings in the United States District Court for the Southern District of Georgia will be designated "T H.C.".

On October 1, 1980, Petitioner filed a state Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The Petition was summarily denied without a hearing. On the same day, the Supreme Court of Georgia denied an application for certificate of probable cause to appeal.

On October 2, 1980, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 was filed in the United States District Court for the Southern District of Georgia. An evidentiary hearing was held in the district court on March 4, 1981.

On April 29, 1981, the district court granted habeas corpus relief, only vacating Petitioner's death sentence. The district court denied relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit.

On appeal, a panel of the Eleventh Circuit,[2] by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983). (A copy of this opinion is attached as Appendix D).

On May 29, 1984, this Court granted certiorari, vacated the decision of the Court of Appeals, and remanded the case for reconsideration in light of Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). Burger v. Zant, ___ U.S. ___, 104 S.Ct. 2652 (1984).

2. Honorable Clarence Allgood, United States District Judge, Northern District of Alabama sat by designation.

On February 5, 1985, the panel of the Eleventh Circuit, again by a 2-1 vote, affirmed the judgment of the district court on remand, instructing the district court to deny the Writ of Habeas Corpus. Burger v. Kemp, 753 F.2d 930 (1985). (A copy of this opinion of the Eleventh Circuit is attached as Appendix C).

This Court again granted certiorari, vacated the decision of the panel and remanded the case to the Court of Appeals for reconsideration in light of Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985). Burger v. Kemp, ___ U.S. ___, 106 S.Ct. 41 (1985).

On remand the panel, by a 2-1 vote, again instructed the district court below to deny the Writ of Habeas Corpus. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986).

B. Statement of Facts

Christopher Burger was convicted for the murder of Roger Honeycutt on September 5, 1977.

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his twenty (20) year old co-indictee, Thomas Stevens, both privates in the Army, stationed at Ft. Stewart, Georgia, were drinking heavily.

In his opening statement to the jury, the prosecutor stated that he would present evidence that prior to the commission of the offense, Christopher Burger consumed "approximately four or five pitchers of beer" (T-Trial at 71). The prosecutor introduced into evidence as State's Exhibit 28 Christopher Burger's confession in which Christopher Burger, a seventeen (17) year old kid, confessed: "We [Chris and co-indictee Stevens] had purchased four or five pitchers of beer and drank it at the club. After we ran out of money . . . Stevens said 'Hey I know how we can get some and I said how is that'. He then stated by robbing a taxicab driver."

Stevens then obtained a knife and knife sharpener to accomplish the robbery.

Stevens and Christopher Burger called the taxi which was driven by Roger Honeycutt. Mr. Honeycutt was threatened with the weapons obtained by Stevens and Stevens took the sixteen dollars ($16.00) in Honeycutt's possession.

At Stevens' direction, Christopher Burger drove the taxi with Stevens and Mr. Honeycutt in the back seat. Mr. Honeycutt was then sexually assaulted by Stevens. After the assault, Stevens locked Roger Honeycutt in the trunk of the taxi.

Christopher Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of Stevens and Petitioner. Botsford testified for the state that during the drive, Stevens told him in great detail about the robbery of Roger Honeycutt and the fact that Honeycutt was still in the trunk of the car. During this time, Christopher Burger sat quietly; it appeared to Botsford that Christopher Burger was essentially doing as Stevens directed.

When Stevens suggested that he would kill Roger Honeycutt, Christopher Burger protested that they should let Honeycutt go and ditch the taxi. Botsford testified as follows concerning this conversation:

> Q. [By the District Attorney] What did you say, if anything, about the man in the trunk?
>
> A. [By Botsford] I asked them what they intended to do with him.
>
> Q. All right. What response, if any, did you get?
>
> A. Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean. They said they wanted to go to maybe Jacksonville or Savannah, and maybe run the car off a pier.
> (T Sent. Trial at 112-113).

After Botsford was dropped off at Fort Stewart, Georgia, Stevens directed Christopher Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. On Stevens' command, Christopher Burger drove the taxi into the pond. After doing this, Chris started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure -- want to make sure the car goes down, with the man in the trunk."

Stevens then disposed of the remaining physical evidence of the offense.

The further facts necessary to the issues raised in this petition will be stated in the argument of the issues.

REASONS FOR GRANTING THE WRIT

I. THE STATE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE ESSENTIAL ELEMENTS OF MALICE AND INTENT, AN INSTRUCTION VIRTUALLY IDENTICAL TO THE ONE CONDEMNED BY THIS COURT IN FRANCIS v. FRANKLIN, ___ U.S. ___, 105 S.Ct. 1965 (1985), IMPROPERLY SHIFTED THE BURDEN OF PROOF OF THESE ELEMENTS FROM THE STATE. UNDER THE STANDARD ESTABLISHED BY THIS COURT IN ROSE v. CLARK, ___ U.S. ___, 106 S.Ct. 3101 (1986), THIS FRANKLIN ERROR WAS NOT HARMLESS.

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a) The Jury Instructions

Christopher Burger was tried and convicted of malice murder. Under Georgia law, malice and intent are essential elements of malice murder. Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a).

At Petitioner's first trial, where the guilt/innocence issue was determined, the trial court instructed the jury on these essential elements as follows:

> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal

> intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.
>
> (T-Trial at 410-411) (emphasis added).

The Georgia state trial court in Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985), gave the following instruction to the jury on the issue of intent:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> Francis v. Franklin, 105 S.Ct. at 1969-1970. (Emphasis added).

"Franklin level[ed] his [successful] constitutional attack at the following two sentences in the jury charge: 'The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the

natural and probable consequences of his acts, but the presumption may be rebutted.'" Franklin, 105 S.Ct at 1972.

This same instruction was given, virtually verbatim, at Christopher Burger's trial (T Tria 410-411).

b) The Franklin Error Was Not Harmless

Recently, in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court held that, "the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, [105 S.Ct. 1965] (1985)." Rose v. Clark, 106 S.Ct. at 3103.

In applying this Rose v. Clark, harmless error test, "the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the [instructed] presumption [of intent]." Id. at 3109 (emphasis added).

As noted by Circuit Judge Johnson's dissent to the panel opinion in the Court of Appeals below, the evidence at trial and the argument of counsel at trial clearly contested the issue of intent at trial. This defense of lack of intent was substantial enough that the Franklin error could not be harmless beyond a reasonable doubt. As Judge Johnson stated:

> Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. . . The essence of Burger's defense was that . . . [he] did not have the requisite intent for murder.
> Burger v. Kemp, 785 F.2d at 893-894 (dissenting opinion of Judge Johnson).

At the time the crime was committed Christopher Burger was seventeen (17), his co-indictee, Stevens, was twenty (20). A clinical psychologist testified that Chris had an I.Q. of 82 and

lacked the power of reasoning to learn from previous experiences; he was functioning at the level of a twelve (12) year old. (T Trial 247-48).

Christopher Burger was heavily intoxicated at the time of the offense.

Stevens was the leader in the relationship, Chris was the follower. Stevens planned and initiated the robbery of the victim, Stevens actually committed the robbery, Stevens sexually assaulted the victim, Stevens tied the victim and forced him into the trunk of the car. Stevens told Christopher Burger that they would have to kill the victim, Chris said he didn't want to kill him.

James Botsford, the State's key witness, testified that Christopher Burger wanted to turn the victim loose. (T Trial at 111).

> . . . Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that, when Botsford suggested that the cab driver should be set free, Burger agreed that this was what should be done.
>
> Burger's defense went squarely to the issue of whether he intended to kill the victim . . . In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction . . .

Burger v. Kemp, 765 F.2d at 895, (dissenting opinion of Judge Johnson).

A defense of lack of intent was squarely raised at Chris Burger's trial and substantial supporting evidence exists in the record. Under this Court's Chapman v. California - Rose v. Clark standard, it cannot be said beyond a reasonable doubt that the jury could not have relied on the impermissible instructed persumption of intent in reaching its verdict.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

(B) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

This issue of ineffective assistance of counsel was raised in the petition for writ of habeas corpus in the district court below and decided adversely to Petitioner. In its previous decision in this case, the Eleventh Circuit affirmed the decision of the district court on this issue. Burger v. Kemp, 753 F.2d 930 (1985). This Court's remand order vacated the Eleventh Circuit's previous opinion in this case. Burger v. Kemp, ___ U.S. ___, 106 S.Ct. 41. The Eleventh Circuit's decision on remand, by instructing the district court to deny the writ of habeas corpus, Burger v. Kemp, 785 F.2d at 892, necessarily reinstates the previous Eleventh Circuit decision on this issue.

(A) Trial Counsel Failed to Investigate or Prepare Evidence for the Capital Sentencing Trial

Christopher Burger's trial counsel presented absolutely no evidence on Chris' behalf at either of his trials. More specifically, trial counsel presented absolutely no evidence of mitigating circumstances at the second trial where the current death sentence was imposed; the trial counsel failed to present evidence of mitigating circumstances at the second trial even

though he knew that his reliance on closing argument alone had resulted in a death sentence at the first trial.

This failure to present evidence of mitigating circumstances was based not upon a reasonable strategy decision, but rather upon a failure to conduct a reasonably adequate investigation.

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense". The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since, "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 24, 31 (1972). The repeated theme of the Court's decisions is that counsel serves "as a guide through complex legal technicalities" for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the adversary system to the creation of a professional prosecuting official. Id. at 309.

"[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2066 (1984).

Christopher Burger's trial counsel made his decision to cease investigation into Christopher Burger's background and to present no evidence of this background at sentencing after conversations with Chris and his mother.

Trial counsel knew that Christopher Burger was a seventeen (17) year old adolescent with an I.Q. of only 82 and possible brain damage (T Trial 1 244, 247-48). Christopher Burger could hardly be expected to be conversant with the intricacies of the broad range of admissible evidence at the penalty phase of trial. Counsel could not make a "reasonable" determination to cease

investigation solely on the basis of his inadequate conversations with his client.

Trial counsel's conversation with Chris' mother was equally insufficient to support any reasonable decisions concerning further investigation and the decision to forego the presentation of evidence. Trial counsel testified as follows concerning his conversation with Chris' mother:

> "Q. When is the first time you talked to any of his [Christopher Burger's] family?
>
> A. [By Mr. Leaphart] Whenever they came to town.
>
> Q. Did you call and tell them about the trial?
>
> A. No, I don't think I did.
>
> Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the--before the supposed--
>
> A. I can't remember. I think I talked with his mother, at some point in time.
>
> Q. Before that.
>
> A. Before the trial?
>
> Q. Before she came to town. You had talked to her.
>
> A. I may have talked to her on the phone. I can't remember.
>
> Q. Did you ask her anything about his background?
>
> A. Yes, I think we discussed it.
>
> Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?
>
> A. I don't think I went into that with her."
>
> (T-H.C. at 36) (emphasis added).

Trial counsel testified that he conducted no further investigation into mitigating circumstances between the first and second trials (T-H.C. at 43-44).

This testimony is consistent wit Chris' mother's (Mrs. Betty Foster) recollection of her conversations with trial counsel:

> Q. Then did you come down for the first trial?
>
> A. [By Mrs. Foster] Yes, sir.
>
> Q. And, what opportunity and how long did you talk to him [trial counsel] before the first trial?
>
> A. I saw him for possibly a half hour prior to going to court.
>
> Q. All right, and did he at that time tell you anything about the type of evidence that could be presented, or ask you anything about Chris' background?
>
> A. He asked me if Chris had ever had any psychological checking, or anything, and I advised him that he had as a child. And, he asked me to try and through Chris' power of attorney get that information for him from the State of Indiana from Florida where I had taken it.
>
> Q. Did you get that information?
>
> A. Yes, sir. I did.
>
> Q. And, did the psychologist ever talk to you? Did Dr. O'Hare ever talk to you, the psychologist that Mr. Burger's attorney, Mr. Leaphart had hired, did he ever talk to you?
>
> A. No, sir, I never saw him until during the first trial when he testified.
>
> * * * * * *
>
> Q. And, after he was found guilty at the first trial, did Mr. Leaphart tell you anything about what type proceeding could take place to determine what punishment he got?
>
> A. No, sir, not really. (T. Hab. Cor. 76-77).
>
> * * * * * *
>
> Q. Did he [trial counsel] tell you anything about what could happen in the penalty phase of the trial?
>
> A. No sir.

Q. Did you know anything about what could happen after he had been found guilty, what evidence the jury could hear?

A. No, I didn't.

Q. Did anybody ask you about the possible witnesses -- getting any witnesses to testify?

A. No, sir.

Q. After the first trial, did anybody ask you about witnesses for the second trial?

A. No, sir.

Q. Did anybody explain to you what could be put into evidence on his retrial on the punishment phase?

A. No, sir.

Q. Did you know?

A. No.

Q. Did you have any idea until we contacted you and told you about these proceedings?

A. No, I did not. (T-H.C. 80).

Judge Johnson, in his dissent to the Eleventh Circuit's previous opinion, analyzed trial counsel's failure to conduct an adequate investigation:

> . . . [It cannot] be said that Leaphart's [trial counsel's] choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, Strickland v. Washington, 104 S.Ct. at 2065-66, none of these strategies or assumptions withstand scrutiny for reasonableness.

* * * * *

> . . . Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. §17-10-2(a) & (c) (1982), formerly Ga. Code Ann. §27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: 'The district attorney shall open and the defendant or his counsel shall conclude the argument.' The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia Criminal procedure in sentencing procedings. Cf. Young v. Zant, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.
>
> The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the 'major argument' in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.
>
> Burger v. Kemp, 753 F.2d at 945-947. (dissenting opinion of Judge Johnson) (footnotes omitted) (emphasis added).

In judging whether Petitioner was prejudiced by the ineffective assistance of trial counsel the bottom line is, did the representation result in a "trial [which] cannot be relied on as having produced a just result" i.e., did he receive "a trial whose result is reliable". Strickland v. Washington, 104 S.Ct. at 2064. Petitioner "need not show that counsel's deficient

conduct more likely than not altered the outcome in the case." Strickland v. Washington, 104 S.Ct. at 2068.

This Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), indicated the type of information critical to a reliable determination of sentence in a capital proceeding involving a teenager. The Court stated in Eddings:

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted[.] In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."
> Eddings, 455 U.S. at 115-116.

Seventeen (17) year old Christopher Burger's background was uncannily similar to that of Eddings; if anything, the mitigation is more persuasive in Chris' case. This mitigation was aptly summarized by Judge Johnson:

> At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. [T-H.C. 81]. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. [T-H.C. 84]. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. [T-H.C. 84-85]. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food

along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. [T-H.C. 85-86]. Burger was taken in by a neighbor, as he had nowhere else to go. [cf. Affidavits at R-142-153]. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.[3] [T Trial 244, 247-248].

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do 'contain references to a difficult childhood which might have created some sympathy for Mr. Burger,' they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that 'may make a critical difference, especially in a capital case,' Stanley v. Zant, supra, 697 F.2d 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of Strickland v. Washington, supra. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of 'breakdown in the adversarial process,' id. at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

Burger v. Kemp, 753 F.2d at 947-948. (dissenting opinion of Judge Johnson) (emphasis added).

In Eddings, supra, the death sentence was reversed by this Court because his sentencer [a judge] refused to consider

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3. This evidence of Christopher Burger's low I.Q. and possible brain damage was presented only at a motion hearing but was never presented to the jury at either trial.

Eddings' background as a mitigating factor. Christopher Burger's sentencer [a jury] failed to consider Chris' background as a mitigating factor; this was due to trial counsel's failure to investigate or present the evidence. In both Eddings and Chris Burger's case, the sentence of death was imposed without consideration of a "particularly relevant" . . . "mitigating factor of great weight." Eddings, 455 U.S. at 115-116.

As recognized by this Court in Eddings, these mitigating circumstances are precisely the type of evidence, in the case of a teenage defendant, which would create "a reasonable probability that absent [counsel's] errors the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 104 S.Ct. at 2069.

B) Trial Counsel's Representation of Petitioner Was Affected by a Serious Conflict of Interest

Alvin Leaphart was appointed by the trial court as counsel for Christopher Burger at the state court trial, at the second sentencing trial and on direct appeal to the Supreme Court of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was appointed by the trial court to represent Christopher Burger's co-indictee, Thomas Stevens. (T-HC 13).

Mr. Leaphart never informed Christopher Burger of the possibility of a conflict of interest nor did the trial court which made the appointment of counsel, ever inquire into the possibility of a conflict of interest (T-HC 15-16).

Leaphart conducted attorney-client conferences with both Stevens and Christopher Burger; he assisted Smith in the preparation of Stevens' case and Smith assisted him in the preparation of Christopher Burger's case. (T-HC 15, 18). The

two partners discussed the issues involved in each case and researched the law together. (T-HC 18).

Leaphart primarily prepared the briefs for both Stevens and Christopher Burger on the second appeal to the Supreme Court of Georgia. (T-HC 40-41).

The fee received by each attorney for representing each client was deposited in the law firm's corporate account. (T-HC 14-15).

This Court in Strickland v. Washington, supra, citing Cuyler v. Sullivan, 446 U.S. 335 (1980), noted that where a conflict of interest is shown, prejudice is presumed where counsel "actively represents conflicting interests" and "that an actual conflict of interest adversely affected [the] lawyer's performance" Strickland, 104 S.Ct. at 2067.

The primary issue at trial, as perceived by counsel, was intent and Chris Burger's lesser culpability vis-a-vis his adult co-indictee, Stevens. This evidence of lesser culpability and the impact of the resulting conflict of interest was summarized by Judge Johnson in dissent to the previous Eleventh Circuit opinion:[4]

> . . . At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens

4. No facts of the conflict of interest were stated in the majority opinion. The majority opinion adopted, without further comment on this issue, the decision of the District Court below. Burger v. Kemp, 753 F.2d at 932.

ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. See Zuck v. Alabama, supra, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." Strickland v. Washington, supra, 104 S.Ct at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger [T-H.C. 38-39, 65]. See Baty v. Balkcom, supra, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); see also, Fleming v. State, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.")

* * * * * *

At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. [T-H.C. at 38-39]. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." [T-H.C. at 65] [emphasis supplied]. From this account it appears that plea negotiations were engaged

> into in this case; that Leaphart never offered Burger's testimony against Stevens; and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testifying against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no pretrial conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.
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> * * * * * *
>
> Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. §17-10-35(c)(3)(1982), formerly Ga. Code Ann. §27-2537(c)(3)(1933).
>
> Burger v. Kemp, 753 F.2d at 944-945. (dissenting opinion of Judge Johnson) (emphasis added, footnote 7 omitted).

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the serious conflicts between Christopher Burger and Stevens, there is no way that the two law partners could vigorously and fully

represent Christopher Burger while also representing Stevens.[5] Attorney Leaphart perceived a defense based on the seventeen-(17) year-old Christopher Burger's lesser culpability vis-a-vis the adult Stevens. However any action taken by Leaphart on behalf of Christopher Burger would work to the extreme disadvantage of Stevens.

Faced with the previously detailed disparity in the culpabilities of the parties, Attorney Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a lesser sentence than death. Unfortunately, Mr. Leaphart never even raised this possibility in plea discussions with the State (T-HC 38-39, 65). And, of course, how could he have arranged this plea negotiation when his divided loyalties also required the protection of Stevens.

This Court in Wood v. Georgia, 450 U.S. 261, 268-69 (1981), clearly recognized as one of the "inherent dangers" of a conflict of interest that the attorney with divided loyalties "will prevent his client from obtaining leniency by preventing his

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5. This Court has consistently emphasized the importance of consideration of the individual in the sentencing phase of a capital case. E.g., Eddings v. Oklahoma, 455 U.S. at 112 (1982):

> ". . . the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death [quoting Gregg v. Georgia]"
>
> * * * * * *
>
> "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett [v Ohio] recognizes a consistency produced by ignoring individual differences is a false consistency" (emphasis added).

client from offering testimony against" the more culpable party.[6]

In Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978), this Court, in addressing the problem of conflicts of interest in the representation of multiple defendants by single counsel, stated:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable.

Leaphart was actively involved in the representation of Christopher Burger's co-defendant, Stevens; he consulted confidentially with Stevens, aided in preparing his case for trial and prepared his briefs on appeal (T-HC 13-18). However, even had Leaphart not been directly involved in the representation of Stevens, a Sixth Amendment conflict of interest would still exist where the joint representation was by two

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6. The Supreme Court of Georgia, subsequent to Christopher Burger's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. Fleming v. State, 264 Ga 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." Id. at 188.

The logic of this rule, explained by Justice Bowles of the Georgia court in his concurring opinion is particularly relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.
>
> Id. at 189 (Bowles, J, concurring) (emphasis added).

different members of the same firm.[7]

The fault in this case lies not only with Mr. Leaphart who failed to call to the court's or Christopher Burger's attention the conflict of interest.[8] The blame must fall, possibly more heavily, on the trial court which appointed one law firm to represent both co-defendants and failed to ever inform Christopher Burger of the conflict.

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7. Eg. United States v. Flannagan, 679 F.2d 1075 (3d Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

   Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function §3.5(b):

   > Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (emphasis added).

8. Cf. Holloway v. Arkansas, 435 U.S. at 485: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."

   Contrast the circumstances of Christopher Burger's case with those in United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) where trial counsel informed his client of the possible dangers of multiple representation of co-defendants:

   > "We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court. . ." Id. at 677 (emphasis added).

As stated by the Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975)[9]:

> The trial judge has an obligation, however, to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed.
>
> * * * * *
>
> . . . courts must avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests.

Although great prejudice to Christopher Burger is shown from the facts of the conflict of interest in this case, a showing of prejudice is not necessary. "Thus, a defendant who shows that a conflict of interest actually affected the advocacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. at 349-50.

As this Court noted in Holloway v. Arkansas, 435 U.S. at 490:

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

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9. The quoted language from Foxworth v. Wainwright was noted with approval in Cuyler v. Sullivan, 446 U.S. 335, 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 28th day of August, 1986.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

March 13, 1986.

After his conviction and sentence of death were affirmed by the Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, and 245 Ga. 458, 265 S.E.2d 796, state prisoner sought habeas corpus. The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted relief and state appealed. The Court of Appeals, 718 F.2d 979, reversed and remanded. The United States Supreme Court, 104 S.Ct. 2652, vacated and remanded. The Court of Appeals, 741 F.2d 1274, remanded. The District Court then denied relief and prisoner again appealed. The Court of Appeals, 753 F.2d 930, affirmed. The United States Supreme Court, 106 S.Ct. 41, remanded. The Court of Appeals held that error in giving instruction which could have been understood as creating a mandatory presumption of intent was harmless.

Remanded.

Johnson, Circuit Judge, filed a dissenting opinion.

1. Criminal Law ⇐1172.2

If intent is not at issue in the case or if intent is overwhelming proved, error in giving an instruction which could be understood as creating mandatory presumption of intent may be found harmless.

2. Criminal Law ⇐778(6)

Jury may never be instructed that intent is or must be presumed.

3. Criminal Law ⇐1172.2

Where defendant did not specifically deny the element of intent but, rather, merely put the prosecution to its proof, error in giving instruction which could have been understood as creating a mandatory presumption of intent was harmless despite evidence that defendant had consumed four or five pitchers of beer before the incident.

Appeals from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

This habeas corpus action, before us for the third time, was remanded by the Supreme Court for our reconsideration in light of *Francis v. Franklin*, — U.S.

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

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APPENDIX A

——, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), *aff'g* 720 F.2d 1206 (11th Cir.1983). The facts of the underlying murder case, for which petitioner Burger was sentenced to death, are reported at *Blake v. Zant*, 513 F.Supp. 772, 788–89 (S.D.Ga.1981). The sole issue now before us is whether the trial court's jury instruction on intent impermissibly shifted the burden of proof on that issue to the defendant. We hold that the challenged instruction constituted harmless error. In our previous opinions, 718 F.2d 979 (11th Cir.1983), 753 F.2d 930 (11th Cir.1985), we found the other issues presented in Burger's habeas petition to be without merit. Consequently, we remand to the district court with instructions that the writ be denied.

In *Franklin*, the petitioner argued that the state trial court erred in giving the following jury instruction:

> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Franklin, — U.S. ——, 105 S.Ct. at 1969–70; 720 F.2d at 1209 n. 2. The Supreme Court agreed with our conclusion that this instruction was constitutionally infirm under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), because a reasonable juror could understand it as creating a mandatory—though rebuttable—presumption of intent shifting the burden of proof on that issue to the defense. — U.S. at ——, 105 S.Ct. at 1977; 720 F.2d at 1212. The Court also agreed with our finding that under the circumstances of the case, the *Sandstrom* error could not be considered harmless. *Id.*

The jury instruction challenged in this case is virtually identical to the one held unconstitutional in *Franklin*. After giving the *Franklin* instruction, however, the court in this case added the following:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake, 513 F.Supp. at 792.

This additional language, taken by itself, appears to be constitutionally unobjectionable, rather than creating a mandatory presumption, it merely instructs the jury that it *may* presume intent from the natural consequences of an act. The Supreme Court made clear in *Franklin*, however, that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." — U.S. at ——, 105 S.Ct. at 1975. Thus, whether this additional language sufficed to render the instruction constitutional may depend upon whether the language is viewed as clarifying or merely contradicting the erroneous charge which preceded it.

[1] We need not reach this issue, however, because we conclude that any error in the instruction was harmless. In *Franklin* the defendant had based his entire defense on the issue of intent, and "[t]he facts did not overwhelmingly preclude that defense." 720 F.2d at 1212. We thus concluded that "[b]ecause intent was plainly at issue in [the] case, and was not overwhelmingly proved by the evidence ... we cannot find this error to be harmless." *Id.* The Supreme Court agreed. — U.S. at ——, 105 S.Ct. at 1977. On the other hand, if intent is *not* at issue in a case, or if intent *is* overwhelmingly proved, a *Sandstrom* error on the element of intent may be found harmless. *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir.) (en banc), *cert. denied*, — U.S. ——, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985).[1]

In this case, Burger's sole defense was to put the prosecution to its proof. As the essence of such a defense is to require the state to fulfill its burden as to each element of the offense, it cannot be said that intent was not at issue. *Cf. id.* (defense of non-participation removes intent from issue even without explicit concession). Nevertheless, it is significant that Burger chose not to raise the issue of intent expressly, for this left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state.

The record tends to show that after sexually assaulting their victim, Burger and his co-defendant placed the victim in the trunk of his taxicab. After telling a friend what they had done, they drove to a water-filled pit. Opening the trunk, Burger found that the victim was still alive. With the victim still inside Burger then closed the trunk once more, removed incriminating fingerprints from the vehicle, and drove the car into the pond, jumping out as the car entered the water. The victim died of drowning. Eventually, Burger confessed to the crime, described the incident in great detail, and led authorities to the pit, pointing out where they could find the victim's body.

Burger's only argument as to why the *Sandstrom* error should not be considered harmless in light of the overwhelming evidence from which the jury could infer intent is that he had consumed "four or five pitchers of beer" before the incident. This, he argues, brings his case under our decision in *Thomas v. Kemp*, 766 F.2d 475 (11th Cir.1985), in which a *Sandstrom* error on intent was found not harmless where the defendant was intoxicated. In *Thomas*, however, the defendant affirmatively raised the issue of intent:

> Thomas took the stand in his own defense and testified that he had no memory of the incident ... He attributed his lack of memory to pills he ... ingested .... Thomas' counsel elicited testimony from the State's examining psychiatrist that it would be possible for a drug to "overmaster [a] person's will or impel him to commit a crime," ... [and] requested and obtained a jury charge on drug intoxication....

766 F.2d at 455–56. By contrast, Burger raised no intoxication defense. Burger's counsel mentioned the beers in his opening statement and Burger's confession referred to them, but the defense made no attempt to argue that the alcohol in any way diminished Burger's capacity or rendered him incapable of forming an intent to commit the murder.

1. We note that the Supreme Court has recently granted certiorari in a case in which it may consider whether a *Sandstrom* error was harmless. *Rose v. Clark*, 762 F.2d 1096 (4th Cir.), *cert. granted*, — U.S. ——, 106 S.Ct. 59, 88 L.Ed.2d 38 (1985).

[2, 3] Under *Sandstrom*, a jury may never be instructed that intent is or must be presumed. Nevertheless, a case may present circumstances which imply intent so overwhelmingly that a reviewing court may conclude that any reasonable jury would infer intent even without being instructed that it had to do so. This is such a case. We are convinced beyond a reasonable doubt that a reasonable jury would have convicted Burger without having to interpret the jury instructions as creating a mandatory presumption of intent. We therefore hold that any error in the instructions was harmless.

The case is REMANDED to the district court with instructions that the writ be denied.

JOHNSON, Circuit Judge, dissenting:

In *Franklin v. Francis*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the United States Supreme Court held that a jury instruction virtually identical to one given in this case was unconstitutional because a reasonable juror could have understood it to shift to the defendant the burden of proof on the issue of intent. The majority does not reach the issue of whether additional language rendered this instruction constitutionally permissible in the instant case, because the majority holds that, even if the instruction was unconstitutional, any error in the instruction was harmless. In coming to this conclusion, the majority misreads the record of petitioner's trial in state court. I dissent.

I. Constitutionality of the Challenged Instruction

It is clear that the challenged instruction in the instant case violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny, and therefore was unconstitutional. As in *Franklin*, the jury was instructed: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." A reasonable juror could have understood this instruction to create "a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Franklin, supra*, 105 S.Ct. at 1972.

The instruction in the instant case was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 792 (S.D. Ga.1981). As the majority notes, the Supreme Court stated in *Franklin* that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Franklin, supra*, at 1973. The Court continued, "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.*

The instruction following the *Franklin* instruction in the case does not explain the *Franklin* instruction. In stating that the jury *may* presume intent from the natural consequences of an act, the second instruction merely contradicts the first. In this situation, we are required to hold that the *Franklin* instruction was unconstitutional.

II. Harmless Error Analysis

Where a burden-shifting instruction on intent constitutes *Sandstrom* error, the error can be held harmless if the court can say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This Court has identified two situations where a *Sandstrom* violation on the issue of intent can be held harmless: (1) where intent is not at issue in the case, or (2) where the evidence of intent is overwhelming. *R Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

The majority holds that in the instant case the petitioner's sole defense was to put the prosecution to its proof. The majority concludes that, although this defense put intent at issue, the defense "left uncountered the strong implication of intent which was bound to arise from the evidence presented by the state." The majority therefore holds that the evidence of intent in this case was overwhelming, and that the *Sandstrom* error was harmless.

A reading of the state trial transcript reveals that Burger's defense entailed far more than simply putting the prosecution to its proof. Throughout the trial, Burger's counsel sought to show that Burger's co-defendant Stevens was the moving force behind the entire crime, and that Burger was merely a follower who did what Stevens told him to do. Indeed, the district court in this case has found that an examination of the trial record shows considerable effort to portray Stevens as the chief architect of the crime. *Blake, supra*, at 795. The essence of Burger's defense was that, although Burger took part in the crimes, he did so under duress and did not have the requisite intent for murder.

The state's main evidence in the guilt phase of this case came from a confession given by Burger and from testimony by James R. Botsford, who was in the same military unit as Burger and Stevens and was their squad leader. The confession was read to the jury by witness Clarence Haire, trial transcript ("tr.") at 278–286, who had taken the confession. In his confession, Burger stated that he and Stevens were out drinking on the night of the crime and ran out of money. Stevens suggested to Burger that they could get some money by robbing a cab driver. Stevens and Burger arranged to take a taxicab to the airport, where they were to pick up Botsford.

On the way to the airport, Stevens pulled a butcher knife on the cab driver, the victim of the crime. After the victim said that he had only sixteen dollars, Stevens forced the victim to get out of the cab and remove his clothes. Stevens discarded the clothes and got in the rear of the vehicle with the cab driver. While Burger was driving, Stevens forced the victim to perform oral sodomy upon him, and Stevens then performed anal sodomy on the victim. At some point, Burger stopped the car and the victim was put in the trunk of the car.

Burger and Stevens picked up Botsford at the airport and proceeded to drive Botsford back to Fort Stewart, their military base. Botsford asked Burger why he was

driving the taxicab, and Stevens answered that they had "taken" the taxicab. Stevens told Botsford that the cab driver was in the trunk, and indicated that they were going to kill the cab driver. As Botsford got out of the car at the base, he asked them not to kill the victim.

Burger and Stevens drove the vehicle away, and then encountered a patrol vehicle. When the patrol vehicle went by, Stevens told Burger that they were going to "get burnt," and that they had to do something with the cab. Stevens told Burger to drive to a nearby pond. At the pond, Stevens directed Burger to wipe the fingerprints off the car. Stevens then directed Burger to put the car in gear and run it into the pond.

After doing this, Burger started to walk away and told Stevens he was leaving. Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk."

In his cross-examination of Mr. Haire, Burger's counsel asked, "Now, your testimony to this jury as to what Burger told you—based on your testimony, is it not, as to what he said and what is contained in his statement, that Stevens was the one that said drive it to the pond, and Stevens more or less directed the whole operation, according to your testimony; is that correct?" Tr. at 297. The court sustained an objection to the question, stating to Burger's counsel: "You're getting into the province of the jury to determine the facts of the situation." *Id.* Burger's counsel then elicited from Mr. Haire the fact that Burger was only 17 years old at the time of the crime.

Mr. Botsford was the key witness for the state. On cross-examination by Burger's counsel, Mr. Botsford gave the following testimony:

> Q. Mr. Botsford, I think you were friends—you say you were friends with Chris Burger and Tom Stevens in boot camp?
>
> A. That's correct.
>
> Q. When they—when you got in the cab and you heard this voice or whatever it was in the back of the cab, did you know who that was?
>
> A. No, I didn't.
>
> Q. So you don't know of your own knowledge whether that was Roger Honeycutt or not; do you?
>
> A. I didn't know him by name. I knew it was the cab driver.
>
> Q. You just knew it was the cab driver back there?
>
> A. The cab driver of the cab.
>
> Q. Well, that's just because they told you it was; isn't that right?
>
> A. That's right.
>
> Q. And, the person that told you that was Stevens?
>
> A. That's correct.
>
> Q. In fact, Stevens was the one that was doing all the talking; wasn't he?
>
> A. Most of it.
>
> Q. And, Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do; wasn't he?
>
> A. Sorta.
>
> Q. I think you said that when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?
>
> A. That's correct.

Tr. at 111.

A clinical psychologist testified that Burger had an IQ of 82, and that Burger lacked the motivation or power of reasoning to learn from previous experiences. Tr. at 247. The psychologist also testified that Burger was "functioning probably at the level of about a twelve year old person." Tr. at 248.

Finally, in closing argument at the guilt phase, Burger's counsel sought to emphasize the evidence that had been produced indicating that Stevens was in control of the cri[illegible]. Counsel said:

> One of the interesting things is the testimony here by Botsford was all about Stevens, what Stevens did, what Stevens said; not what Burger did or what Burger said. I would have thought and you may gather that we weren't trying Chris Burger here; we were trying Thomas Stevens. Don't convict Burger on what somebody said about Stevens, because Stevens is not on trial. Burger is on trial.

Tr. at 371-72.

It is clear from the foregoing that Burger's defense did not consist merely of putting the prosecution to its proof. Rather, Burger presented substantial evidence, and argument based on that evidence, that his participation in the crime was under the direction and control of Stevens. Stevens did virtually all the talking and gave all the orders. The crime and the killing were Stevens' ideas. Botsford testified that when Botsford suggested that the cab driver should be set free, *Burger agreed that this was what should be done.*

Burger's defense went squarely to the issue of whether he intended to kill the victim. I cannot agree with the majority that the evidence of Burger's intent to kill was overwhelming. In finding that Burger had the requisite intent, the jury might have relied on the faulty instruction that a person is presumed to intend the natural and probable consequences of his acts. I cannot say beyond a reasonable doubt that the faulty instruction did not contribute to the verdict obtained. *Davis, supra,* at 1521 n. 7. Accordingly, I dissent.

APPENDIX B

Denial of Rehearing En Banc in Burger v. Kemp

July 23, 1986

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

July 23, 1986.

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 13, 1986, 11 Cir., 785 F.2d 890).

PER CURIAM:

The panel opinion of March 13, 1986 should not be interpreted as requiring a defendant to place intent explicitly in issue before he can prevail on a challenge to burden shifting instructions on criminal intent. The panel majority simply noted that evidence of intent is more likely to be overwhelming where the defendant has not attempted to counter the state's evidence on criminal intent.

With the foregoing clarification of the panel opinion the petition for panel rehearing is DENIED and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, Fed.R.App.P. 35, 11th Cir. Rule 26, the suggestion for rehearing en banc is DENIED.

Judge JOHNSON adheres to the views previously expressed in his dissent from the panel opinion.

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

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APPENDIX B

APPENDIX C

Burger v. Zant, 753 F.2d 930 (11th Cir. 1985)

Christopher A. BURGER,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals,
Eleventh Circuit.

Feb. 5, 1985.

Death-sentenced defendant filed petition for writ of habeas corpus, alleging, inter alia, that he received ineffective assistance of counsel. The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, 718 F.2d 979, reversed and remanded. On certiorari, the United States Supreme Court, 104 S.Ct. 2652, vacated the judgment and remanded with instructions. The Court of Appeals, 741 F.2d 1274, remanded to the District Court with instructions. On remand, the United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., found defendant's claim to be without merit. Defendant appealed. The Court of Appeals, adopting the District Court opinion, held that: (1) defense counsel's decision not to direct jury's attention to character-oriented mitigation evidence at defendant's capital sentencing trial was a product of reasonable strategic judgment and did not represent ineffective assistance of counsel, and (2) fact that defendant and codefendant were represented by attorneys who were partners and who worked together on the cases did not give rise to such conflict of interest as to deny defendant effective assistance of counsel.

Affirmed, remanded with instructions that writ be denied.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(6)

Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place defendant's character in issue through his prior record or other criminal acts; however, bad character evidence can be admitted only when defendant has been notified prior to trial that such evidence will be presented. O.C.G.A. § 17-10-2.

2. Criminal Law ⇐1208.1(5)

Under Georgia law, jury in capital sentencing trial may not consider nonstatutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime.

3. Witnesses ⇐274(1)

Aside from admissibility at capital sentencing trial of evidence of defendant's bad character, Georgia prosecutors may elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant.

4. Criminal Law ⇐641.13(1)

Reasonableness of defense counsel's trial strategy should be viewed not in hindsight, but primarily in light of the information supplied to counsel by the defendant,

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APPENDIX C

for purposes of determining whether defendant received effective assistance of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(7)

Defense counsel's decision not to direct jury's attention to character-oriented mitigation evidence at defendant's capital sentencing trial was a product of reasonable and strategic judgment that, in light of defendant's personality, introducing such evidence could needlessly open the door to disclosure of contrary character evidence on cross-examination; hence, performance prong of ineffectiveness claim was not satisfied, and prejudice prong need not be reached. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.5

Attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.5

Mere fact that attorneys for defendant and codefendant were partners and assisted each other in the respective cases did not create such conflict of interest as would deny defendant effective representation of counsel; although it could be said that the two attorneys at times acted as one while each prepared for trial and appeal, any inducement of defendant's attorney to actively represent conflicting interests would be at best speculative, not actual, under the circumstances. U.S.C.A. Const.Amend. 6.

Appeals from the United States District Court for the Southern District of Georgia.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, District Judge.

PER CURIAM:

Our previous consideration of the merits of this case resulted in reversal of the district court's grant of a writ of habeas corpus setting aside petitioner's death sentence. *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983). In reaching our decision we adopted the district court's opinion, *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981), with respect to three issues, including Burger's claim that he had been denied effective assistance of counsel.

The Supreme Court granted certiorari limited to one aspect of that issue, *i.e.*, Burger's claim that his trial counsel failed to investigate, prepare or present evidence for the sentencing phase of his capital trial. The Court concluded that the district court had apparently made a mistake in assessing the evidence on that aspect of the ineffectiveness of counsel issue. *Burger v. Zant*, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984). It therefore vacated and remanded to this court for reconsideration, particularly in light of *Strickland v. Washington*, 466 U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). — U.S. at —, 104 S.Ct. at 2653.

This court retained jurisdiction but remanded to the district court instructing it to extend or revise its findings and if

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama sitting by designation.

appropriate, its conclusions and judgment. *Burger v. Zant*, 741 F.2d 1274 (11th Cir. 1984). On remand the district court reexamined Burger's claim and on October 10, 1984, entered its order holding the same to be without merit. A copy of the district court's order is made an appendix to this opinion. Following entry of the district court's order we allowed counsel to supplement their prior briefs.

[1–7] Upon reconsideration, we again adopt the appended order of the district court as our own opinion.

Our previous reversal of the district court's grant of the writ was based on the so called *Stephens* issue. 718 F.2d 981, 982. That issue is no longer before us. On the issue presently before us we affirm the district court's holding that Burger's petition is without merit. Accordingly, we again remand to the district court with instructions that the writ be denied.

REMANDED with instructions.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

CHRISTOPHER BURGER, Petitioner

v.

WARDEN ZANT, ET AL., Respondents

CV280-114

ORDER

On limited remand from the Eleventh Circuit Court of Appeals, this Court has before it the task of examining petitioner Christopher Burger's claim that he received ineffective assistance of counsel at his second capital sentencing trial. At that trial, petitioner received a sentence of death.

I. *Background*

Mr. Burger's crimes, trials, appeals and habeas proceedings are detailed elsewhere in the record of this case. *See Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978) (murder conviction affirmed, sentence vacated, case remanded for resentencing), *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980) (death sentence affirmed), *cert. denied*, 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980), *Blake v. Zant*, 513 F.Supp. 772, 787–803 (S.D.Ga.1981) (writ denied as to conviction but granted as to death sentence), *rev'd*, *Burger v. Zant*, 718 F.2d 979 (11th Cir.1983), *reh'g en banc denied*, 726 F.2d 755 (11th Cir.1984), *cert. ed. Burger v. Zant*, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 360 (1984) (remanded with instructions), *Burger v. Zant*, 741 F.2d 1274 (11th Cir.1984) (limited remand to district court).

Previously, this Court concluded, *inter alia*, that petitioner was not denied effective assistance of counsel at his second sentencing trial. The Eleventh Circuit affirmed this Court as to this issue and adopted this Court's opinion as its own. *Burger v. Zant*, 718 F.2d at 981. On appeal, the United States Supreme Court vacated the opinion of the Eleventh Circuit and instructed it "to reconsider the effectiveness of counsel's assistance at petitioner's second sentencing and for further consideration in light of *Strickland v. Washington*, 466 U.S. —, [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)." 466 U.S. —, 104 S.Ct. 2652, 80 L.Ed.2d 674 (1984). The Supreme Court also noted that this Court

APPENDIX—Continued

may have mistaken the first sentencing transcript for the second sentencing transcript when it considered the reasonableness of counsel's decision not to present character evidence to the resentencing court.

Thereafter, the Eleventh Circuit remanded the case to this Court, with instructions to "address the matter to which specific reference was made by the Supreme Court[.]" 741 F.2d at 1275. The court of appeals also stated that this Court "is not limited to that question and shall make such findings as it deems appropriate in light of the Supreme Court's action." *Id.* at 1275.

II. *Conclusion*

In its original decision, this Court examined petitioner's "ineffective assistance" argument and enumerated six claims meriting discussion. 513 F.Supp. at 795. In light of the standards announced in *Washington*, this Court affirms its earlier decision as to claims two through four, as well as claim six; they provide no grounds for habeas relief. Claim one will be reexamined *infra*.

A. *Failure to Present Mitigating Evidence*

Turning to petitioner's fifth claim—that his counsel was ineffective because he failed to present mitigating evidence to the sentencing jury—the Court reviews the standards articulated in *Washington*, *supra*, and *United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Washington*, the Supreme Court

> [e]stablished a two-prong test for analyzing ... [ineffective assistance] challenges. First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at —, 104 S.Ct. at 2065. Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at —, 104 S.Ct. at 2068.

Green v. Zant, 738 F.2d 1529, 1536 (11th Cir.1984) (hereafter, *Green*); *see also Smith v. Wainwright*, 741 F.2d 1248 (11th Cir.1984); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir.1984); *Boykins v. Wainwright*, 737 F.2d 1539 (11th Cir.1984); *Soloman v. Kemp*, 735 F.2d 395 (11th Cir. 1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Boykins*, at 1543, quoting *Washington*, 104 S.Ct. at 2068. "Furthermore, a defendant must satisfy both the performance and prejudice prongs to successfully demonstrate an ineffective assistance claim. [*Washington*], at —, 104 S.Ct. at 2067. *Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir.1984) (hereafter, *Chadwick*).[1] Courts need not address both of these components "if the defendant makes an insufficient showing on one." *Washington*, 466 U.S. at —, 104 S.Ct. at 2069, 80 L.Ed. at 699.

In addition, the *Washington* court emphasized that "a substantial burden of proof rests on a defendant who advances such a claim: the challenged proceeding enjoys a 'strong presumption of reliability.' *Id.* at —, 104 S.Ct. at 2069." *Boykins*, at 1543.

Finally, the Eleventh Circuit noted in *Green* that its

> [o]wn cases have established that '[e]ffective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight,' *Goodwin v. Balkcom*, 684 F.2d [794,] 804 [(11th Cir. 1982)], and our determination of whether petitioner was denied effective assistance 'must be based on the totality of circumstances in the entire record rather than on specific actions.' *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir.1981). Thus, even if we agree that any of petitioner's complaints against his counsel is well founded, this does not necessarily mean that constitutionally ineffective assistance has been established.

738 F.2d at 1536.

In its original Order, this Court did review the resentencing record but erroneously cited to the transcript of the first sentencing trial. Accordingly, the Court will again review the second sentencing transcript.

As he did at the first sentencing trial, attorney Alvin Leaphart decided not to direct the jury's attention to character-oriented mitigation evidence at petitioner's second sentencing trial. (Federal Habeas Hearing Record, hereafter, "R." 34, 73).

APPENDIX—Continued

Although he was aware of the fact that Georgia permits a broad scope of mitigating evidence to be admitted at capital sentencing trials (R. 34, 36), it was Leaphart's judgment "that the best approach was ... to argue the difference in [age between Burger and accomplice Thomas Stevens, as well as] the difference in their participation in the crime." (R. 34). In addition, he sought to "make the District Attorney prove his case[,]" (R. 18) by using the rules of evidence "to prevent [the prosecution] from doing so." (R. 18). The trial record reflects this strategy. *See, e.g.*, Tr. 65, 67, 95–6, 106–7, 109, 111, 117, 136, 1[illegible]81, 185–191.

Apparently in recognition of the range of evidence the State is permitted to present at sentencing trials (*see* note 6 *infra*), in addition to the strength of the evidence against his client, Leaphart decided to rely primarily on his closing argument to the jury. In his argument, Leaphart illuminated the acts of co-indictee Stevens[2] and minimized Burger's involvement in the murder and related crimes. He fully emphasized the fact that Stevens was twenty years old at the time of the crime, while Burger was only seventeen; that Stevens, the chief architect of the crimes, had considerable influence over petitioner. (Tr. 251, 253). He enumerated, as he did [illegible] first sentencing trial, the series of criminal acts committed by Stevens in contrast to the relatively fewer acts committed by Burger, who "was only following Stevens." (Tr. 250–253).

Next, Leaphart attempted to stimulate the jurors' religious sensitivities. (Tr. 256). He also argued that an "eye for an eye" was a notion popular with the people of

1. "In [*United States v.*] *Cronic*, [— U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], the Court carved out a narrow exception to *Washington*'s general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' — U.S. at —, 104 S.Ct. at 2048; *see also Washington*, 466 U.S. at —, 104 S.Ct. at 2065." *Chadwick*, 740 F.2d at 900. Examples of presumed prejudice would include cases where counsel was denied the right of effective cross-examination or 'where the defendant was denied counsel at a critical stage of the trial.' *Id.* No such exception is evident in the instant case.

2. Stevens and Burger were tried separately.

APPENDIX—Continued

Moses and of the old testament, but not with the people of today.[3] (Tr. 257–258).

Leaphart concluded his closing argument by re-emphasizing the contrast between the acts of Stevens and Burger, then asking the jury "[w]hat would Jesus Christ do if he were sitting in our shoes today?" (Tr. 259).

The outline above reflects the best strategy Leaphart felt was available to him. Interviews with Burger (R. 37), Burger's mother (R. 37, 44) and an attorney who had befriended Burger and his mother (R. 44), in addition to his consultation with a psychologist[4] (R. 14, 50) and review of psychologists' reports obtained through Burger's mother (R. 35–36, 44), convinced Leaphart that a more exhaustive investigation into Burger's background would not be a profitable pursuit.[5] He also concluded that presenting background and character evidence to the sentencing jury would have been at best unproductive (R. 34, 52), and at worst, harmful to his client (R. 73).

Leaphart decided to keep his client off the stand for a number of reasons. He testified that he was not able to keep Burger from talking about his crime to others. (R. 65). He believed that Burger enjoyed talking about the crime, *id.*, and he feared that petitioner would gloat about it on the stand. (R. 66). He did not believe that Burger's mother would be able to provide testimony sufficiently useful to warrant calling her to the stand. "[S]he could not add anything . . . other than being a mother and saying I don't want you to put my child in jail, or in the electric chair." (R. 68). He also feared that during cross-examination she would disclose unfavorable information about her son. *Id.*

In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984), another Georgia state prisoner under sentence of death also sought habeas relief by alleging, *inter alia*, that he received ineffective assistance of counsel at the penalty stage of his trial.

The Eleventh Circuit did

> [n]ot detect any semblance of ineffectual representation during the penalty stage of the trial to support Cape's charge that his lawyer did not present sufficient mitigating evidence. Counsel investigated potential mitigating evidence and presented that which he felt would reflect favorably to his client. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel.

Id. at 1301.

It is true Cape's counsel presented some mitigating evidence while in the instant case petitioner's counsel presented no mitigating evidence. It is also true, however, that Leaphart's conversations with Burger, Burger's mother and family friend, together with his study of psychologists' reports, indicated to him that further investigation into this area would have been fruitless. Furthermore, and especially in light of his perception of Burger's personality, Leaphart, who had represented other death penalty defendants (R. 30, 58–59), feared opening the door to needless illumination of contrary character evidence by the prosecution on cross-examination. This Court's inquiry is therefore properly focused on the reasonableness of Leaphart's investigation and decision regarding this rejected strategy. In that regard,

> [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchangeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support *the limitations on investigation*. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Washington, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695 (emphasis added). Further focusing on what "limitations on investigation" would be evaluated in assessing the reasonableness of an attorney's performance, the Supreme Court emphasized that

> [w]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. DeCoster*, 624 F.2d [196] at 209–210 [(D.C.Cir.1976)].

Washington, 466 U.S. at ——, 104 S.Ct. at 2066–2067, 80 L.Ed.2d at 696.

Leaphart testified that Burger never gave him the names of any witnesses that might have been helpful to him at trial. (R. 63). Despite this, Leaphart did consult, as mentioned above, with Burger's mother and volunteer "big brother," (R. 77) and reviewed reports written by Burger's former psychologists. He was unable to unearth background information sufficiently helpful to warrant further investigation, nor to sway his decision not to emphasize petitioner's character at the second sentencing trial.

Petitioner Washington, like petitioner Burger, also confessed to, *inter alia*, his involvement in the crimes of kidnapping and murder. Unlike Burger, Washington had pleaded guilty and relied on an earlier plea colloquy with the sentencing judge, who had commended Washington for tak-

3. The obverse side of this coin was applied by the prosecutor in *Cape v. Francis*, 741 F.2d 1287, 1301 n. 15 (11th Cir.1984).

4. The psychologist on whom Leaphart relied indicated that he would not be able to provide helpful testimony. (R. 50–51). Moving the trial court for appointment of additional psychiatric study would have been counterproductive, according to Leaphart, because he believed that the state court would have sent his client to a state hospital—one which, according to Leaphart, had a reputation for producing reports favorable to the prosecution. (R. 51).

5. Q. Did you make any attempt to talk to the other people that he had lived with during his life?

A. I couldn't—didn't know who they were. I knew that (Burger) had been in wherever he had come from to go in the Army. He had been—he had lived there. And, then his mother and father had separated at an early age as I recall. He was down in Florida for a while. Had gotten in some trouble down in Florida and then he went back up North where he lived and got in some trouble up there. And, then he ended up in the Army. And, very basically, I couldn't find anything in Mr. Burger's background which I felt would be helpful. You know, I could have put his mother up, I'm sure. And, she could have said some nice things about him. But, my feeling was that a lukewarm witness would have without any real thing to say would have possibly been harmful. And, I felt—I just decided not to do it.

(R. 59).

APPENDIX—Continued

ing responsibility for his crimes. In both cases, however, defense counsel were faced with evidence of their clients' confessions, the overwhelming strength of the evidence against their clients and aggravating circumstances surrounding the crimes. In preparing for the sentencing hearing in *Washington*, counsel spoke with the defendant's

> wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [cit]. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

466 U.S. at ——, 104 S.Ct. at 2057, 80 L.Ed.2d at 684.

As in the instant case, Washington's "[c]ounsel decided to look no further for evidence concerning respondent's character and emotional state. That decision reflected [*inter alia*,] trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* The Supreme Court concluded that "[t]rial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little help .... Restricting testimony on [Washington's] character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and [Washington's] criminal history, which counsel had successfully moved to exclude, would not come in." 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.[6] In addition, the

6. Within specified limits, Georgia prosecutors are permitted at capital sentencing trials to place the defendant's character in issue through his prior record or other criminal acts. "All aspects of [a convicted felon's] crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. *See Lockett v. Ohio*, 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] [cits]. *Collier v. State*, [244 Ga. 553, 261 S.E.2d 364 (1979)]." *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, *cert. denied*, 449 U.S. 956, 101 S.Ct. 407, 66 L.Ed.2d 250, *reh'g denied*, 449 U.S. 1104, 101 S.Ct. 903, 66 L.Ed.2d 831 (1980); O.C.G.A. § 17-10-2. This may include "[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes ... subject to the notice provisions of the statute .... [a] man [also] convicted ... of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes." *Fair*, 245 Ga., at 873, 268 S.E.2d 316, quoted in *Zant v. Stephens*, 462 U.S. 862, —— n. 22, 103 S.Ct. 2733, 2748 n. 22, 77 L.Ed.2d 235, 256 n. 22 (1983); *see also id.*, 462 U.S. at ——, 103 S.Ct. at 2743, 77 L.Ed.2d at 251 ("But the Constitution does not require the jury to ignore ... possible aggravating factors [other than those specified in the sentencing statute] in the process of selecting ... those defendants who will actually be sentenced to death."); *Id.*, 462 U.S. at —— n. 17, 103 S.Ct. at 2743 n. 17, 77 L.Ed.2d, at 251 n. 17; *Godfrey v. Francis*, 251 Ga. 652, 660, 308 S.E.2d 806 (1983), *cert. denied*, — U.S. ——, 104 S.Ct. 1930, 80 L.Ed.2d 475 (1984).

However, bad character evidence can be admitted only "[w]hen the defendant ha[s] been notified prior to trial that such evidence will be presented." *Brown v. State*, 233 Ga. 843, 849, 220 S.E.2d 922 (1975). The evidence must be geared toward providing "[a]n *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [*Stephens*, 103 S.Ct. at 2744 (emphasis in original)]. *Ritter v. Smith*, 726 F.2d 1505, 1515 (11th Cir.1984). In addition, the jury may not consider non-statutory aggravating circumstances unless it has found the existence of at least one statutory aggravating circumstance involved in the crime. *Stephens*, *Moore v. Zant*, 722 F.2d 640, 643-44 (11th Cir.1984); *see also McCleskey v. Zant*, 580 F.Supp. 338, 390 (N.D. Ga.1984). Such evidence must not be "constitutionally impermissible" or "totally irrelevant to the sentencing process." [*Stephens*, 103 S.Ct. at 2747]." *Moore*, at 643. Furthermore, "[t]he defendant is accorded substantial latitude as to the types of evidence he may introduce." *Gregg v. Georgia*, 428 U.S. 153, 164, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976), *reh'g denied*, *see also Readenour v. Wainwright*, 732 F.2d 803 (11th Cir.1984).

Nevertheless, there is no suggestion that State prosecutors may not elicit further information damaging to the defendant when cross-examining character witnesses called by a defendant. *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1345 (5th Cir.1984).

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mitigating evidence "[a]t most ... show[ed] that numerous people who knew [Washington] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to a level of extreme disturbance." *Id.*

In the instant case, counsel was faced with evidence of not only Burger's signed, but sworn confession (Tr. 151-153), to participation in a gruesome crime. This evidence was bolstered by, *inter alia*, eyewitness and tangible evidence. The crime included petitioner's depraved act of asking the victim if he "was all right" before petitioner drowned him. Similar to the setting in *Washington*, counsel in the instant case was convinced from what he learned from his investigation that no productive result would obtain from further pursuing Burger's background, even in light of Leaphart's knowledge that Burger had come from a broken home, *see Griffin v. Wainwright*, 588 F.2d 1549, 1562 (M.D.Fla. 1984), and that emphasizing character evidence would be the wrong strategy to employ. This judgment is not unreasonable, especially in light of the fact that calling a character witness to the stand is not "without risk; there are, almost invariably, unknown poisons to be hatched out of the mud by way of cross examination." *See, e.g., Knighton v. Maggio*, 740 F.2d 1344, 1448 (5th Cir.1984) (defense counsel not ineffective when he made "the value judgment that the gain to be expected from the favorable testimony of family witnesses would not justify the risk of the potential harm from unfavorable testimony expected on cross-examination."). The reasonableness of the decision should be viewed not in hindsight, but primarily in light of the information supplied by the defendant. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

In *Collins v. Francis*, 728 F.2d 1322 (11th Cir.1984), Collins contended that his

> counsel was ineffective because he failed to investigate for possible use at the sentencing phase of his trial any evidence of mitigating circumstances. [Collins] allege[d] that counsel failed to look into his character and the record and background of his family. He also allege[d] that counsel failed to contact his relatives and friends regarding testimo-

2. In an affidavit submitted to this Court, petitioner's uncle avers that petitioner came from a broken home and that he was uncared for by his parents. He opined that Burger had a split personality. "Sometimes [Burger] would be a nice, normal guy, then at times he would ... go out and would get violent over nothing." Affidavit of Carmel R. Holtsclaw at 1-2; *see also* Affidavit of Cathy Russell Rix at 1 ("He had a hair-trigger temper. He would get mad and punch the wall. Once he broke his knuckles he got so mad."). On one hand, a jury could react with sympathy over the tragic childhood Burger endured. On the other hand, since Burger's sanity was not in issue in this case, the prosecution could use the same testimony, after pointing out that petitioner was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of Burger's victim. *See* note 6, *supra*. "[M]itigation ..." after all, [m]ay be in the eye of the beholder." *Stanley v. Zant*, 697 F.2d 955, 969 & n. 11 (11th Cir.1983) (footnote omitted).

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ny they might have been able to give on the issues of guilt or punishment.

Id. at 1349.

Collins pointed to affidavits from friends who said they would have vouched for his good character at the trial. Collins' counsel stated "that Collins never gave him the names of such friends; consequently, he made no attempt to uncover any[.]" (*Id.*) and the habeas court gave credence to counsel's testimony. The Eleventh Circuit accepted this finding and this factor figured into its conclusion that Collins was not denied effective assistance of counsel.

In the instant case, this Court similarly finds that Burger did not provide his attorney with the names of those individuals apparently located by Mr. Leaphart's successors. It is true that petitioner's current attorneys were successful in finding other witnesses who could paint a tragic childhood background; it is also true that they were able to "elicit" a more compelling explanation of Burger's background from his mother than did Leaphart. (R. 74-87).[8] That post-death sentence attorneys with greater resources materialize to illuminate, through the use of hindsight, weaknesses in the strategy employed by pre-sentence attorneys equipped with comparatively fewer resources, was apparently recognized by the Supreme Court in *Washington*, when it emphasized that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 [1574-1575] (1982).

Washington, 466 U.S. at ——, 104 S.Ct. at 2065, 80 L.Ed.2d at 694; see also *Stanley v. Zant*, 697 F.2d 955, 964 n. 7, *reh'g denied*, 706 F.2d 318 (11th Cir.1983); *Williams v. Maggio*, 679 F.2d 381, 392 (5th Cir.1982) (en banc).

As mentioned above, courts must accord "a heavy measure of deference to counsel's judgments" 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and pay heed to those instances where the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful[.]" *Id.*, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. In such instances, "[c]ounsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* Indeed,

> in his argument to the jury at the sentencing hearing, [Burger's] lawyer made the strategic choice to focus on policy considerations against the imposition of the death penalty rather than call attention to the character of the petitioner. We cannot discredit counsel's trial tactics in pursuing this course, taking into consideration the overwhelming evidence of guilt and the bizzare nature of the crime.

Cape v. Francis, 741 F.2d at 1301.

As was the Eleventh Circuit in *Cape*, this Court is "[m]indful of the many obstacles and pitfalls that confront lawyers in the defense of capital murder cases. The responsibilities and pressures are awesome. In retrospect, one may always identify shortcomings." *Id.*[9]

Indeed,

> [e]ffective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising .... [Counsel's] knowledge of local attitudes, his evaluation of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of the defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the 'chemistry' of the courtroom are ... all a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

Stanley v. Zant, supra, 697 F.2d at 970.

In the instant case, it cannot be said that Leaphart's "[t]actical decision[ ] ... amount[s] to ineffective assistance[, as it is not] so ill-chosen as to render the trial fundamentally unfair. [*Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696].'" *Solomon v. Kemp, supra*, 735 F.2d at 402. Furthermore, "'counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all available hope withers.' *Lovett v. Florida*, 627 F.2d 706 (5th Cir.1980)." *Id.* This Court concludes that "[c]ounsel's strategic choice was well within the range of professionally reasonable judgments, and the decision not to seek more character ... evidence than was already in hand was likewise reasonable." *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 701.

8. The *Collins* court also found significant the fact that counsel reasonably concluded that Collins' mother would not have made a favorable impact on the jury. In the instant case, Leaphart testified that after interviewing Burger's mother, he concluded that she would not have made any further impact on the jury except that degree of sympathy which might have been derived from her patience plea to the jury for mercy for her son. Furthermore, he did not deem it wise to risk possibly negative consequences from going into testimony. The Court does not find credible her assertion, made in response to a question asked by a post-death sentence attorney, that Leaphart never asked her about Burger's background. (R. 76).

9. *See Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "make[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[.]" (*Id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(c) (1982) (in the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's conception of the particular jury's sense of the 'chemistry' of the courtroom and ... all a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

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9. *See Burger v. Zant*, 718 F.2d at 992-994 (Johnson, J. dissenting). In his dissent, Judge Johnson faulted Leaphart for "make[ing] a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments." *Id.* at 992. Judge Johnson concluded that "the basic assumption on which this strategy was based is patently unreasonable[.]" (*Id.*), since in the sentencing phase of the process there is no right of the defendant to open and close argument following the state's presentation of its evidence. O.C.G.A. § 17-10-2(c) (1982) (in the sentencing phase, "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument."). With respect, this Court must disagree with Judge Johnson's conclusion. In response to questions aimed at illuminating Leaphart's conception of all knowledge and capabilities in handling ... and cases, Leaphart indicated that "[i]n the ... in the normal [case, guilt-innocent phase of the case],[ ]" he felt that the presentation of witness testimony would not have been worth the loss of his duties to open and close during the final argument phase of the trial. (R. 87) (emphasis added). O.C.G.A. § 17-8-71 (1982) specifies that "[i]f the defendant introduces no evidence, his counsel shall open and conclude that argument to the jury after the evidence on the part of the state is closed." Where a defendant does present evidence, he loses his right to open and close. *See, e.g., Hubbard v. State*, 167 Ga.App. 32, 305 S.E.2d 849 (1983). In fairness to Judge Johnson, the Court recognizes that it incorrectly applied this distinction in its original Order. *See Blake v. Zant*, 513 F.Supp. at 798.

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Because petitioner's showing is insufficient as to the performance prong of the *Washington* test, it is not necessary to address the prejudice prong. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2071, 80 L.Ed.2d at 702 ("[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, petitioner's claim that his counsel was ineffective because he failed to present mitigating evidence at his second sentencing trial is DENIED. "[On this particular claim, petitioner] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.*

B. *Conflict of Interest*

Since an attorney's freedom from conflict of interest is an important consideration in any examination of his effectiveness (*see Burger v. Zant*, 718 F.2d at 987–991 (Johnson, J., dissenting)), the Court will revisit its earlier conclusion. This claim is best analyzed by first examining what was and was not actually present in this litigation. As noted above, Burger and coindictee Stevens were tried separately. Each was represented by appointed counsel. Burger's counsel did employ a strategy adverse to Stevens' interests when he emphasized Stevens' greater culpability in the crime.

On the other hand, Stevens' counsel was also Leaphart's partner, Robert B. Smith. (R. 13–14). It is undisputed that the two lawyers made an attempt to construct a "Chinese Wall" between themselves. In fact, in varying degrees, they worked together on both cases at the trial and appellate levels. (R. 18, 49–11). Smith sat in with Leaphart on Burger's case, but Leaphart did not involve himself with Stevens' trial, which followed Burger's. (R. 18).

Leaphart was questioned on what effect, if any, his collaboration with Smith had on his resolve to represent Burger.

THE COURT: Did you pull any punches in order to protect Stevens?

A. No.

THE COURT: If crucifying Stevens would have helped Burger, would you have done it?

A. Yes, sir.

Q. Did you do it?

A. Didn't have the opportunity.

(R. 53).

As mentioned above, Leaphart did emphasize Stevens' greater culpability in the crime. He also investigated Stevens to ascertain what, if anything, might be useful to his defense of Burger. (R. 54). In addition, he constantly attempted to plea bargain with the prosecutor in the case. (R. 65). However,

> A. [d]uring the first trial [the prosecutor] just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—the district attorney about entering a plea, for Mr. Burger to serve a life sentence. And, he insisted on trying it and insisted on seeking the death penalty.

Id.

The prosecutor's flat refusal to engage in plea bargaining is not surprising when viewed in light of the strength of the case against Burger. As mentioned above, this evidence included Burger's signed, sworn confession (Tr. 151–155), which was complied with a *Miranda* waiver (Tr. 291–293),

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along with eyewitness and tangible evidence. In addition, there is no suggestion that this evidence was not available to be used against Stevens. This background provides suitable perspective to the following examination by petitioner's federal habeas attorney:

> Q. Mr. Leaphart, did at any time during the representation did you talk to the District Attorney about the possibility of Mr. Leaphart (sic) testifying against Mr. Stevens?
>
> A. You mean Mr. Burger?
>
> Q. Mr. Burger, excuse me.
>
> A. No.
>
> Q. There was no discussion of his testimony in exchange for a lighter sentence for Mr. Burger?
>
> A. No, sir.

(R. 38–39).

Since the prosecution "flatly refused to even discuss" plea bargaining, it follows that Leaphart would not have talked to the prosecutor about offering his client's testimony against Stevens.

Leaphart testified that at no time did he believe a conflict of interest to exist in the case during the trials and appeals. (R. 62). Finally, the conflict of interest issue was never raised at the trial level. (R. 15).

The standards for reviewing a conflict of interest claim are well settled.

> For a conflict of interest to cause representation to fail Sixth Amendment standards, the conflict must be actual, not speculative. *United States v. Alvarez*, 626 F.2d 1307, 1309 (11th Cir.1980), *cert. denied*, 464 U.S. 967, 104 S.Ct. 1578, 79 L.Ed.2d 909 (1983). *Batts v. Balkcom*, 661 F.2d 391, 395 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). "[A] defendant shows that his counsel actively represented conflicting interests; he has not established the constitutional predicate for his claim of ineffective assistance. *Batts v. Balkcom*, *supra*, at 39

United States v. Ard, 731 F.2d 718, 72 727 (11th Cir.1984); *Westbrook v. Za* 704 F.2d 1487, 1499 (11th Cir.1983); *Uni States v. Mers*, 701 F.2d 1321, 1328 (1 Cir.), *cert. denied*, — U.S. —, 104 S. 481, 78 L.Ed.2d 679 (1983); *see also R ham v. United States*, 724 F.2d 1529 (1 Cir.1984) (not all conflicts are so egre as to constitute a Sixth Amendment viola Judge Johnson stated that Leaphart a Smith acted as one attorney, that Leaph in effect represented both Burger and Stevens. 718 F.2d at 988. Setting aside t fact that Burger and Stevens received se arate trials, the Court turns to *Unit States v. Carr*, 740 F.2d 339 (5th Cir.19 where the Fifth Circuit stated that

> "[a] conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a codefendant whom counsel is also representing [citc] In assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a conflict of interest exists . . ." *Cuyl [v. Sullivan]*, 446 U.S. [335] at 347 [1 S.Ct. 1708, 1717, 64 L.Ed.2d 333] [citi

740 F.2d at 344.

The mere fact that the attorneys assist each other in Burger and Stevens' ca does not convince this Court that a conf of interest has been shown. Although may be said that the two attorneys at tim

APPENDIX—Continued

acted as one while each prepared for trial and appeal, any inducement of Leaphart to actively represent conflicting interests—"to pull any punches" in his representation of Burger—would be at best speculative, not actual. There has been no showing that Leaphart "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Mers*, 701 F.2d at 1328. In fact, Leaphart testified that he neither felt nor recognized the existence of a conflict of interest when he represented Burger. (R. 62). Nor can it be said that the overlap of counsel, to the extent it existed, infected Leaphart's representation so as to constitute an "active representation of conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

Accordingly, the Court affirms its earlier conclusion that petitioner is not entitled to relief on this ground.

To summarize, petitioner's claim that his attorney provided ineffective assistance of counsel at the second sentencing trial in this case is without merit. In addition, no conflict of interest on the part of his attorney has been shown.

SO ORDERED, this 10 day of October, 1984.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's adoption of the district court order denying Burger's claim that he was deprived of effective assistance of counsel. A review of the record reveals that Burger was denied the effective assistance of counsel by both his appointed counsel's active representation of his co-indictee's conflicting interest and his counsel's failure to present any evidence on his behalf at either of his two sentencing proceedings.

The general principles applicable to ineffective assistance of counsel claims were articulated in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also King v. Strickland*, 748 F.2d 1462 (11th Cir.1984). To demonstrate that the assistance provided by counsel was so deficient as to require reversal, a defendant must make a two-pronged showing. First, he must demonstrate that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 2064. Such errors must be outside the generous range given to "reasonable professional judgment." *Id.* at 2066. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. To meet this portion of his burden, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 2068. A court reviewing an ineffective assistance claim, however, must bear in mind that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system relies on to produce just results.

Id. at 2069.

The Court in *Strickland v. Washington* also considered the showing that is required when a defendant argues that counsel was ineffective by reason of conflict of interest.[1] Where counsel breaches the duty of loyalty to his client, a limited presumption of prejudice applies. *Strickland v. Washington, supra*, 104 S.Ct. at 2067; *Cuyler v. Sullivan*, 446 U.S. 335, 345–350, 100 S.Ct. 1708, 1716–1719, 64 L.Ed.2d 333 (1980). Prejudice is presumed if the defendant can demonstrate that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington, supra*, 104 S.Ct. at 2067; *Cuyler v. Sullivan, supra*, 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718.

Turning first to Burger's conflict of interest claim, the record is clear that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both were appointed counsel by the trial court at approximately the same time. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart also testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Both lawyers discussed the issues involved in each case and researched the law together.[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one law firm represented both Burger and Stevens,[5] the end result was that Leaphart

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing ("THC") at 18.

3. THC at 40–41.

4. The warden-appellant argues that the conflict of interest cases relied upon by Burger are inappropriate as involving the representation of multiple defendants by one attorney. Here, appellant contends, Burger and Stevens were represented by "separate" attorneys. The argument is contrary to the facts as reflected by the record. Leaving aside the fact that Leaphart and Smith were partners in the practice of law, the attorneys here were each active in the defense of the other's client and "seem to have viewed themselves as a defense 'team' acting on behalf of [both] of the accused." *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 515 (3d Cir. 1979), *rev'd on other grounds, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart consulted confidentially with Stevens, aided in preparing his case for trial, and prepared the briefs for both of his appeals. "Whatever may have been the extent of each attorney's participation in the trial of the defendants, we are satisfied that it was sufficient to establish that both attorneys represented [both] defendants." *Id.*

5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (quoting *United States v. Hilton*, 471 F.Supp. 397, 399 n. 1 (S.D.N.Y.1979)).

was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[5] a finding of multiple representation alone does not establish ineffective assistance of counsel. The conflict must be shown to be actual, not merely speculative, before representation will violate Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981). "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' " *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.1979) (*quoting Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, *supra*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another whom the same counsel is representing ").

In this case the fundamental issue framed by counsel was not Burger's guilt but the extent of his culpability. At the habeas corpus hearing, Leaphart exhaustively reviewed the evidence that the extent of Burger's culpability was less than that of Stevens.[7] In sum, this evidence was as follows. At the time the crime was committed, Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 82 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger was the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In this situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. Such adversity in the interests of Leaphart's clients demonstrates that an actual conflict of interest existed. *See Zuck v. Alabama*, *supra*, 588 F.2d at 439 (adversity sufficient to demonstrate actual conflict of interest exists if "the attorney owes a duty to the defendant to take some action that could be detrimental to his other client").

The evidence provided by petitioner also demonstrates that this conflict "adversely affected his lawyer's performance." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2052. On several occasions, Leaphart refrained from taking actions in support of Burger that would have been detrimental to Stevens. For example, at no time in his representation of Burger did Leaphart offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, *supra*, 661 F.2d at 397 N. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, 189 (Bowles, J., concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). The district attorney's disinclination to plea bargain did not stop Leaphart from "constantly attempting" to bargain for a life sentence; there is no reason to say it should have deterred him from making the more attractive offer of Burger's testimony against Stevens. Moreover, at Burger's trial Stevens was not called as a witness by the defense. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. 17-10-35(c)(3) (1982), formerly Ga.Code Ann. 27-2537(c)(3) (19 ").

Once a defendant has made the [illegible] showings required by *Strickland v. Wash-*

see also United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir.1977) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir.1979) (ineffective assistance found where "[t]he law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the state prosecutor who tried Zuck."); Fed.R.Crim.Pro. 44(c) ("[w]henever two or more defendants have been jointly charged . . . and are represented by . . . retained . . . appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."); *construed in Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates its recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent co-defendants with conflicting interests."); *ABA Code of Professional Responsibility* DR 5-105(d). Further, the Supreme Court of Georgia, exercising its supervisory role over the Bar, has adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. *Hewing v. State*, 264 Ga. 90, 270 S.E.2d 185 (1980). This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Id.* at 188 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 348, 100 S.Ct. at 1718 ("[a] possible conflict of interest inheres in almost every instance of multiple representation"); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

7. THC at 20-53.

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lighter sentence. THC at 38-39. When further questioned about plea negotiations in Burger's case, Leaphart testified that he had engaged in plea negotiations, but that "*during the first trial* [the district attorney] refused to discuss it on any terms." THC at 65 (emphasis supplied). From this account it appears that plea negotiations were entered into in this case, that Leaphart never offered Burger's testimony against Stevens, and that, after Burger's first trial had begun, the district attorney refused to discuss a plea on whatever terms Leaphart had offered, presumably not the terms of Burger's testimony against Stevens since Leaphart testified he did not at any time make such an offer. Thus, appellant's argument that no *pretrial* conflict of interest could have arisen due to the district attorney's refusal to plea bargain is contradicted by the record.

ington, supra, prejudice is presumed. 104 S.Ct. at 2067. *See also Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir.1983); *Baty v. Balkcom, supra*, 661 F.2d at 395 ("when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless") (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). Even accepting the district court's finding, adopted by the majority in this case, that Leaphart did not "tailor[ ] his [trial] strategy toward protecting Stevens," there is sufficient evidence of an actual conflict and of tangible adverse effect on Leaphart's performance establish a Sixth Amendment violation.[9]

Burger also argues that he was denied the effective assistance of counsel because Leaphart failed adequately to investigate possible mitigating evidence or to present *any* evidence, in mitigation or otherwise, at either of his two sentencing proceedings. Counsel's duty of effective representation continues into the sentencing phase of his client. *See Stanley v. Zant*, 697 F.2d 955, 963 (11th Cir.1983) ("The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial."). At the core of the duty of effective representation is the "independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). To fulfill this obligation, counsel must make reasonable investigations or make a reasonable decision that makes further investigation unnecessary. *Strickland v. Washington*, 104 S.Ct. at 2066. An examination of the relevant facts suggests that Leaphart failed in both his duty of investigation and his duty of representation at the sentencing proceeding.

The district court found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother and an attorney who had befriended her. Although the content of those conversations and the identity of possible character witnesses were not clear, the district court concluded that Leaphart made "adequate if hardly ideal inquiries" and that his "investigation appears to meet at least minimal professional standards." Such an investigation should not be characterized as reasonable or substantial. Moreover, even the scant amount of information which was unearthed through Leaphart's investigation was not presented in the proceeding itself. Nor can it be said that Leaphart's choice to curtail investigation and to present no evidence at the sentencing proceedings was a reasonable strategic decision based on reasonable assumptions. Leaphart has attempted to justify his approach by reference to three strategies or assumptions: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case; 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument; and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble be-

9. The district court appears to take the position that it would not be possible to make a full demonstration of prejudice of the type, for example, that is required for general ineffective assistance claims under *Strickland v. Washington*. Whether or not such a showing would be possible is not relevant, however, to the issue of conflict of interest. In conflict of interest cases, as noted above, a limited presumption applies on a showing of some "adverse effect" on the lawyer's performance, which has been amply demonstrated on the instant case.

fore, which would have been undercut by an investigation into and testimony concerning Burger's background. Even conceding that broad range must be given to the operation of professional judgment, *Strickland v. Washington*, 104 S.Ct. at 2065–66, none of these strategies or assumptions withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District attorney prove his case. And my theory of defense was to—well, that in effect in essence what it was. And, use whatever rules of evidence and to prevent him from doing so.[10]

And, specifically concerning the second trial solely on the issue of penalty, Leaphart again testified that he "felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts."[11] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but rather reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all; and reliance on such a strategy in a capital sentencing proceeding, as an alternative to investigating and presenting available mitigating evidence, is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. As the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. 27-2503(a) & (c) (1933), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and the defense closed final arguments to the jury. Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). No strategy based on such a false assumption is reasonable. The district court clearly erred in concluding otherwise.[12]

The district court also found that Leaphart's failure to substantially investigate mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. Insofar as it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing pro-

10. THC at 18.

11. THC at 52.

12. The district court's explanation that Leaphart's rationale was appropriate in the context of the culpability trial provides no justification for its application in the context of a sentencing proceeding where, as noted above, the Georgia procedural rules are different.

ceeding stressed Burger's comparative lack of culpability and asked for the jury's mercy. This argument would not have been undercut by the presentation of humanizing evidence concerning Burger's background.

In short, Leaphart's decision neither to conduct substantial investigation nor to present any evidence at the sentencing proceedings was not a reasonable strategic choice. It was, moreover, readily distinguishable from the choices made by attorneys in those cases relied upon by the district court. In *Cape v. Francis*, 741 F.2d 1287 (11th Cir.), the district court found that petitioner's attorney presented some mitigating evidence during the sentencing proceeding; and in *Strickland v. Washington*, *supra*, petitioner's attorney relied on character testimony that had come in at an earlier plea colloquy. 104 S.Ct. at 2071. Leaphart's presentation of no evidence in the instant case is different; it represented an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, *supra*, 104 S.Ct. at 2064.

But the Sixth Amendment inquiry does not end with a finding of unreasonable performance by counsel. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Id.* In this case, however, prejudice is apparent.

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. This evidence demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent being shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida, his stepfather told him he could not stay with them. Burger's mother told juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

I cannot accept the holding that the failure to present this evidence was not prejudicial to Burger. The district court found that, although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not that Burger was a model citizen, but that Burger's personality and motivation could be explained by his unusually stormy childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case." *Stanley v. Zant*, *supra*, 697 F.2d at 969, Leaphart elected neither to conduct further investigation nor to use the evidence at the sentencing proceeding. Having heard the state's case, unmitigated by any evidence presented on behalf of petitioner, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Strickland v. Washington*, *supra*. In fact Leaphart's failure to investigate or to present evidence on his client's behalf is an apt example of the kind of "breakdown in the adversarial process," *id.* at 2069, that requires a reviewing court to find the results of a proceeding unreliable.

For these reasons, I would reverse the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and remand this case with directions to grant the writ.

APPENDIX D

Burger v. Zant, 718 F.2d 979 (11th Cir. 1983)

Christopher A. BURGER, Plaintiff-Appellee, Cross-Appellant,

v.

Walter A. ZANT, Warden, Georgia Diagnostic and Classification Center, Defendant-Appellant, Cross-Appellee.

No. 81-7419.

United States Court of Appeals, Eleventh Circuit.

Oct. 13, 1983

Defendant was convicted of murder, and on appeal, Georgia Supreme Court, 242 Ga. 28, 247 S.E.2d 834, affirmed conviction but vacated death sentence and remanded for resentencing. On remand, defendant was again sentenced to death, and Georgia Supreme Court, 245 Ga. 458, 265 S.E.2d 796, affirmed. After United States Supreme Court denied certiorari, defendant filed petition for writ of habeas corpus, and United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.Supp. 772, granted writ and vacated death sentence, and state appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) where one of three aggravating circumstances remained valid, fact that other two were reversed as erroneous did not render entire verdict invalid, and (2) death sentence may constitutionally be imposed under Georgia's aggravating circumstance that defendant's crime was, inter alia, outrageously or wantonly vile, horrible or inhuman in that it involved torture, based on finding that defendant inflicted either psychological or physical torture upon his victim.

Reversed and remanded.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1208.1(5)

Where one of three aggravating circumstances remained valid, fact that other two were reversed did not render entire verdict sentencing defendant to death invalid.

2. Habeas Corpus ⇐391(1)

Failure to object at resentencing hearing did not bar review of issue whether trial court erroneously instructed on aggravating circumstances, because state Supreme Court ruled on its merits, and because state waived procedural default by not raising it.

3. Criminal Law ⇐796

In instructing on aggravating circumstance that jury may impose death penalty if defendant's crime was, inter alia, outrageously or wantonly vile, trial court need not supply additional definitions or limiting instructions. O.C.G.A. § 17-10-30(b)(7).

4. Homicide ⇐340(4)

Although trial judge, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not expressly specify that jury could not find that a crime was "outrageously or wantonly vile, horrible or inhuman" without making a specific finding that it demonstrated "torture, depravity of mind, or an aggravated battery to the victim," jury returned verdict that clearly revealed its understanding that the two clauses were interrelated, and therefore trial court did not err in its instruction. O.C.G.A. § 17-10-30(b)(7).

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APPENDIX D

5. Homicide ⇐310(1)

Trial court, in instructing on aggravating circumstance that offense of murder was, inter alia, outrageously or wantonly vile, did not err by failing to instruct that jury could not find "depravity of mind" without finding that defendant had tortured or physically abused victim before his death, because jury's verdict clearly linked "torture and depravity of mind." O.C.G.A. § 17-10-30(b)(7).

6. Criminal Law ⇐1208.1(5)

Death sentence may constitutionally be imposed under Georgia statutory aggravating circumstance, which provides for imposition of death sentence where defendant's crime was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim, based on finding that defendant inflicted either psychological or physical torture upon victim. O.C.G.A. § 17-10-30(b)(7).

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

VANCE, Circuit Judge:

The State of Georgia appeals the district court's grant of a petition for a writ of habeas corpus setting aside the death sentence of Christopher Burger.

The facts in the case are set out in the district court's opinion. *Burger v. Zant*, 513 F.Supp. 772, 788-89 (S.D.Ga.1981). Briefly, Christopher Burger and Thomas Stevens, both soldiers at Fort Stewart, Georgia, were indicted for the murder of Roger Honeycutt, also a soldier. On September 4, 1977, Burger and Stevens decided to rob a taxicab driver. The victim, who supplemented his military income by driving a taxi, picked up the two men. Burger and Stevens threatened Honeycutt with knives, forced him to stop the cab and robbed him of sixteen dollars. The victim was placed in the back seat of the cab with Stevens. As Burger drove the vehicle, Stevens forced Honeycutt to disrobe and then to participate in acts of oral and anal sodomy. The victim, nude and bound, was then placed in the trunk of the cab.

With Honeycutt still in the trunk, Burger drove the cab to the local airport, where he and Stevens met a friend and fellow soldier, James Botsford. As they drove back to Fort Stewart, Burger and Stevens explained what they had done, confirming their story by exchanging remarks with Honeycutt in the trunk. After some discussion, Botsford convinced his friends to promise to release Honeycutt unharmed. They dropped Botsford off at the post.

Burger and Stevens then drove to a nearby "borrow pit" which was filled with water. After removing their fingerprints from the cab and removing it radio, Burger raced the trunk and asked Honeycutt if he was all right. Honeycutt responded affirmatively. Burger then closed the trunk, started the car and drove it into the pond, jumping out of it before the car entered the water. The victim died by drowning.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Christopher Burger was convicted of murder and sentenced to death. Stevens was tried separately, convicted, and also sentenced to death. *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). On direct appeal to the Georgia Supreme Court, Burger's conviction was affirmed but his death sentence was vacated and the case remanded for resentencing. *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978).

On remand, Burger was once again sentenced to death and the sentence was affirmed by the Supreme Court of Georgia. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980). The United States Supreme Court denied certiorari. 448 U.S. 913, 101 S.Ct. 31, 65 L.Ed.2d 1175 (1980).

After unsuccessfully exhausting available state post conviction remedies, Burger filed a petition for a writ of habeas corpus in federal district court. The district judge granted the writ insofar as it vacated Burger's death sentence.

The state of Georgia as appellant and Burger as appellee/cross-appellant raise five issues before this court: whether Burger was denied effective assistance of counsel, whether the jury instructions impermissibly shifted the burden of proof onto the defendant, whether *Miranda* violations occurred, whether the district court properly vacated Burger's death sentence where the jury instructions concerning two of the three aggravating circumstances upon which it was based were insufficient and whether the jury instruction on the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) [offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to victim] channeled the discretion of the jury to impose the death sentence.[1] All of these questions were carefully analyzed in District Judge Edenfield's opinion. 513 F.Supp. at 788-803. As to the first three issues, we adopt Judge Edenfield's opinion as our own. The final two issues require discussion.

(1)

The *Stephens* Issue

Christopher Burger's sentencing jury based its death sentence upon three statutory aggravating circumstances: (a) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping"; (b) the "offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery"; (c) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." On direct review, the Georgia Supreme Court held that the trial court had erroneously failed to instruct the jury on the definitions of kidnapping and robbery. The Georgia Supreme Court upheld the death sentence, however, based on the single remaining aggravating circumstance. *Burger v. State*, 265 S.E.2d at 800.

The district court vacated Burger's death sentence, holding that the Supreme Court of Georgia's deletion of the first two aggravating circumstances rendered the entire verdict invalid. The district judge based his decision on our opinion in *Stephens v. Zant*, 631 F.2d 397, modified on

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1. In addition Burger challenges the admission of the confession he gave to the district attorney conducted by the district attorney. The confession was taken [illegible] which he signed the [illegible] with which he furnished the [illegible] Burger

panel rehearing, 646 F.2d 446 (5th Cir. 1981),[2] and Burger and Georgia agree that *Stephens* controls this issue in the present case. Certiorari was granted in the United States Supreme Court in *Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to the Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222, *question answered*, 250 Ga. 97, 297 S.E.2d 1 (1982).

[1] On June 22, 1983, the United States Supreme Court decided *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), reversing the judgment rendered by a panel of the former fifth circuit. The Court held that under the Georgia capital punishment statute the invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated. The Court found the death penalty in that case permissible because there were two remaining aggravating circumstances that "adequately differentiate[d that] case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at —, 103 S.Ct. at 2741. So long as "at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence," *Zant v. Stephens*, 456 U.S. 410, 414, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982), the death sentence may stand. We thus reverse the district court's order compelling resentencing based on our opinion in *Stephens*.

2. In *Spivey v. City of Piedmont*, 662 F.2d 1301 (11th Cir.1981), a panel of the circuit adopted as precedent all former fifth circuit decisions rendered on direct appeal prior to October 1, 1981. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the circuit held that it would have cast decisions of the former fifth circuit also as binding precedent as the aforementioned cut-off

(3)

The *Godfrey* Issue

Burger also challenged the adequacy of the trial court's charge on the sole remaining aggravating circumstance that was applied in his case. Under Ga.Code Ann. § 17-10-30(b)(7), a jury may impose the death penalty if it finds that the defendant's crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Since "[a]lmost, of course, arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), the potential subjectivity of § (b)(7) has made it the target of numerous constitutional challenges. Although the Supreme Court ruled that § (b)(7) was not unconstitutional on its face in *Gregg*, the Court conceded that the statutory language might be subject to abuse if the Georgia Supreme Court were to adopt "an open-ended construction" of its terms. *Id.* Four years later, the Court re-examined the operation of § (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and concluded that the Georgia courts had strayed from the stringent and narrow path marked out in *Gregg*. In *Godfrey*, there was no allegation that the murders committed by the defendant involved either torture or an aggravated battery, and the sentencing jury based its imposition of the death penalty on the complete ground "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court upheld the sentence on review, but the Supreme Court reversed. Writing for a plurality of the Court, Justice Stewart held that the jury's findings were an insufficient basis for imposing the death penalty, because "nothing in these few words, standing alone ... implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.* at 428, 100 S.Ct. at 1765. Although Justice Stewart found that the Georgia Supreme Court in *Godfrey* had ignored its responsibility "to keep § (b)(7) within constitutional boundaries," *id.* at 429, 100 S.Ct. at 1765, he noted that other decisions by that court had placed a limiting construction on the statute that was sufficient to bring § (b)(7) within the ambit of constitutional acceptability:

> The *Harris* [*v. State*, 237 Ga. 718, 229 S.E.2d 1] and *Blake* [*v. State*, 239 Ga. 292, 236 S.E.2d 637] opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehends all the [mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. 446 U.S. at 431, 100 S.Ct. at 1766. As long as the Georgia courts observed these precedents, Justice Stewart suggested, death sentences imposed on the basis of § (b)(7) would meet the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[2, 3] In the present case, the trial judge charged the jury that one of the bases for imposing the death penalty was a finding "that the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture and depravity of mind." Burger contends that this was insufficient to provide adequate guidance to the jury, and asserts that the trial court was required under *Godfrey* to explain and limit the meaning of § (b)(7) in accordance with the construction of the statutory language and Georgia case law presented by Justice Stewart in the plurality opinion.[3] The district court

3. We agree in principle that Burger did not object to the (b)(7) instruction at the time(s) he should have. He does not bar review of the issue under the decision of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), however, for either of two reasons. First, we address the issue because the Georgia Supreme Court ruled on it on the merits. *Burger v. State*, 248 Ga. 774, 285 S.E.2d 708 (1982). The court expressly observed that "[c]onsideration of points not [objected to] is necessary to the development of a uniform body of law to the great benefit of both citizens and [the] state," and that "[i]n a case [in which] the death penalty is imposed, [the] court will [not] procedurally default [a] case [on the] basis of [the] failure [to object]." Second, [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). [illegible] *Sykes* [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). [illegible] *Sykes* [illegible] *Wainwright* [illegible] *Sykes* [illegible] *Jones v. Wainwright*, 604 F.2d 411, 414 (5th Cir.1979), *cert. denied*, 445 U.S. 919, 100 S.Ct. 1282,

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was subjected was anything other than physical." *Id.*, but the situation in the present case is far less clear. In *Burger*, the jury might have viewed the evidence that was presented in a number of different ways. The jury found that Burger had tortured his victim, and the evidence supports a finding beyond a reasonable doubt that Honeycutt was tortured before he died. There was sufficient evidence from which the jury may properly have concluded that Burger aided and abetted his codefendant Stevens in physically torturing Honeycutt, as well as that he personally tortured Honeycutt both physically and psychologically. On the other hand, it is also conceivable that the jury may have found that while Stevens physically tortured Honeycutt, Burger inflicted only psychological torture on him.[6] This case therefore requires us to answer the question which we raised but did not resolve in *Stanley*: whether there is any significant distinction between mental or psychological and physical torture under either the law of Georgia or the Constitution. If the latter is within constitutional limits but the former is not, *Sandstrom* requires that the jury must receive instructions to this effect.

The deliberate infliction of mental anguish certainly comes within the commonly understood meaning of the word "torture,"[7] and the sole support which Burger offers for his argument that the court should hold differently is the language of Justice Stewart's plurality opinion in *Godfrey*. As an initial matter, it is important to emphasize that the *Godfrey* plurality's reversal of the death sentences imposed in his case ultimately stemmed not from its dissatisfaction with the jury instructions, but from its belief that the Georgia Supreme Court had failed to carry out its place in the statutory scheme given conditional approval in *Gregg*.

> In past cases the State Supreme Court has apparently understood this obligation of carrying with it the responsibility to keep it [its] (p87) within constitutional bounds. . . . Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the [statute].

446 U.S. at 429, 432, 100 S.Ct. at 1765, 1767. Thus, the key inquiry in the mind of the *Godfrey* plurality was whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing the defendant's sentences of death. Justice Stewart found that it had not done so in *Godfrey*, basing this view on his construction of the Georgia statute and case law. He noted, however, that his research was limited to cases pre-dating 1978, and he conceded that the third of the "separate but consistent conclusions" which he deduced from the Georgia case law—the requirement that torture be construed *in pari materia* with "aggravated battery"—was derived from a single decision, *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). The basis for Justice Stewart's conclusion was apparently the Georgia Supreme Court's statement that it "[c]onsider[ed] torture and aggravated battery on the one hand *as substantially similar treatment* of the victim and depravity of mind on the other hand as relating to the defendant . . ." 236 S.E.2d 643 (emphasis added).

Although Justice Stewart's construction of the Georgia law on this point was strongly criticized at the time, *see, e.g., Godfrey*, 446 U.S. at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment); 446 U.S. at 443, 100 S.Ct. at 1772-73 (Burger, C.J., dissenting); Donahue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 Cath.U.L.Rev. 13, 41-47 (1980), the Georgia Supreme Court subsequently affirmed its adherence to his construction in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 329 (1980), where the court noted that "[t]orture occurs when the victim is subjected to serious physical abuse before death." 268 S.E.2d at 334. The *Hance* court went on, however, to endorse an expansive definition of the term "serious physical abuse":

> *Serious* sexual abuse may be found to constitute serious physical abuse. [Citation omitted.] "Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined. Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Id. Subsequent decisions by Georgia's highest court have reaffirmed its interpretation of "physical abuse" as including both sexual and psychological abuse as well. *See, e.g., Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221 (1982); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 (1981).

Since the Georgia law therefore follows common usage in finding that the deliberate infliction of mental anguish constitutes "torture," we conclude that the trial court's failure to elaborate or define the term further does not run afoul of the rule in *Sandstrom*. In meaningful contrast to the more amorphous term "depravity of mind," "torture" has a readily understandable and generally understood meaning. This excludes a reasonable risk that the jury might give it an unintended interpretation.

We are no more persuaded that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees. The central theme of the Supreme Court's death penalty jurisprudence has always been that the states must draft and apply their capital punishment laws in a manner that "genuinely narrow[s] the class of persons eligible for the death penalty." *Zant v. Stephens*, — U.S. at —, 103 S.Ct. at 2742-43, thereby precluding a "principled basis for distinguishing [a] case, in which the death penal-

6. The district court's correct analysis of the evidence is as follows:

> Of course, the present case involves many circumstances which may readily be seen as involving "torture" and collective "depravity of mind." There was ample evidence upon which the jury might have found petitioner aided and abetted in Stevens' subjecting the victim prior to his death. Serious sexual abuse has been equated with "torture" under Georgia law. *Hance v. State*, 245 Ga. 856, 268 S.E.2d 329 (1980). Similarly, serious physical abuse can readily be seen in the confining of the victim in the car trunk for a period of hours, bound, nude and certainly anxious as the victim was by capture and torture. Likewise, there can be little question but that petitioner's subjecting upon Honeycutt's condition prior to subsequent the two self-admitted "deprivals of mind" and further, that the victim's being in the trunk as he could fully anticipate torture.

513 F.Supp. 708-09.

7. In pertinent part, the definition of torture provided by Webster's New Collegiate Dictionary is as follows:

> 1 : the infliction of severe pain (as by beating, pinching, or wrenching) to punish, coerce, or afford sadistic pleasure 2a : mental or bodily suffering : anguish

ty [is] imposed, from the many in which it [is] not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia Supreme Court has recently demonstrated that it will not allow the category of psychological abuse to become all-inclusive.[5] In *Phillips v. State*, *supra*, the court emphasized that a finding of "serious psychological abuse" required a showing that "the defendant inflicted deliberate, offensive and prolonged pain on his victim prior to death." 297 S.E.2d at 221. Thus, "the mere apprehension of death, immediately before the fatal wounds are inflicted" was found insufficient to justify a finding of "torture" under § 0(b)(7). *Id.*

[4] We therefore decide that a death sentence may constitutionally be imposed under § (b)(7) based on a finding that the defendant inflicted either psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two, and it seems highly questionable that Justice Stewart meant to draw such a distinction in *Godfrey*. The standards applied by the Georgia courts certainly restrict the class of persons eligible for the death penalty by reason of the "torture" provision of § (b)(7), and the facts of this case easily place it within the core of those the statute was designed to reach. Burger's contentions must therefore be rejected.

Having concluded that both phases of Burger's trial are free of constitutional error, we reverse the judgment of the district court and remand with instructions that the writ be denied.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I concur in the majority's opinion except that, for the following reasons, I dissent from that part of the opinion adopting the district court's opinion and order, 513 F.Supp. at 795-98, denying Burger's petition for habeas corpus relief on the grounds that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments at both of his state court trials and on appeal to the Supreme Court of Georgia. A review of the record reveals that Burger was denied the effective assistance of counsel both by his appointed counsel's active representation of his co-defendant's conflicting interest and by his counsel's failure to present any evidence in mitigation at either of his two sentencing proceedings.

A review of the general principles applicable to all ineffective assistance of counsel claims is in order. The Sixth Amendment guarantees a criminal defendant the right to "*effective* assistance of counsel, that is, counsel reasonably likely to render and rendering effective assistance." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en b. set), *cert. granted*, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The appropriate methodology for determining whether there has been effective assistance of counsel is to examine the totality of circumstances in the record. *Batty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B 1981). Although neither an expert nor a non-expert case is defendant entitled to error-free counsel, the "number, nature and seriousness of the charges

5. Here, of course, as in *Zant v. Stephens*, our decision "is not based on the existence of an important procedural safeguard, the mandatory appellate review of a death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." ___ U.S. at ___, 103 S.Ct. at 2747.

against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981).

Turning first to Burger's conflict of interest claim, in order to establish the constitutional predicate for ineffective assistance Burger must show that his counsel actively represented actually conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Westbrook v. Zant*, 704 F.2d 1487, 1489 (11th Cir.1983). Applying this standard to the facts of this case, the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.[1]

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that he worked then with—discussed the matter with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens,[4] or where one attorney, Leaphart, represented Burger and another attorney, Smith, represented Stevens, the situation is comparable to the facts as reflected in the record. Leaphart and Smith were partners in the practice of law, the attorneys had worked closely in the defense of the other's client and seem to have served their roles as a defense team acting on behalf of [illegible] of the accused. *United States ex rel. Sullivan v. Cuyler*, 581 F.2d 1175, 1179 (3d Cir.1978), *aff'd on other grounds*, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Leaphart conducted conferences with Stevens, aided in preparing his case for trial, and prepared the briefs for both his [illegible]. Whether this be the result of each

1. The Sixth Amendment guarantee of effective assistance of counsel necessarily includes the guarantee of conflict-free counsel. *Holloway v. United States*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir.1978).

2. Transcript of Federal Habeas Corpus Hearing (THC) at 49.

3. HH at 50-51.

4. The record may well indicate that the conflict of interest was imposed by Burger's attorneys, in requiring the representation of multiple defendants by one attorney. Once Burger's counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. Leaphart and Smith discussed the issues involved in each case and researched the law together. Smith sat at counsel table and assisted Leaphart during Burger's trial. Although not physically present at Stevens' trial, Leaphart testified that he worked then with—discussed the matter with Bob [Smith]. We researched the law together."[2] Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he "primarily" prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia.[3] The fee received by each attorney for representing each client was deposited in the law firm's corporate account. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest.

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firm represented both Burger and Stevens,[5] the end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

Although multiple representation is the paradigm context in which conflict of interest claims arise,[6] a finding of multiple representation alone does not establish ineffective assistance of counsel. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.1975). The conflict must be shown to be actual, not speculative, before it will cause representation to fail Sixth Amendment standards. *Baty v. Balkcom*, 661 F.2d at 397. "An actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties." *Zant v. Alabama*, 568 F.2d 436, 439 (5th Cir.1978) (*quoting Castillo v. Estelle*, 504 F.2d 1245, 1245 (5th Cir.1974)); *see also Baty v. Balkcom*, 661 F.2d at 397 ("[a]n actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.").

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'.[7] Summarized, the evidence was that at the time the crime was committed Burger was seventeen; Stevens was twenty. Burger has an I.Q. of 92 and possible brain damage. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense, damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Zant v. Alabama, 568 F.2d at 439.

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger.[8] *See Baty v. Balkcom*, 661 F.2d at 397 n. 12 ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also Fleming v. State*, 246 Ga. 30, 270 S.E.2d 185, 189 (1980) (Hawkes, concurring) ("[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining."). Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on co-defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less

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5. "The same principles [governing Sixth Amendment conflict of interest claims] apply where the joint representation is by two members of the same firm." *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir.1980) (*quoting United States v. Hoffman*, 471 F.Supp. 895, 899 n. 4 (S.D.N.Y.1979)); *see also United States v. Rosahn*, 504 F.2d 1039, 1047 (2d Cir.1974) ("[t]he same rule applies with equal force to representation of two or more defendants by members of the same law firm."). *Cf. Zack v. Alabama*, 583 F.2d 436, 438 (5th Cir.1978) (ineffective assistance found where "[t]he law firm which served as counsel to Zack in his murder trial also represented, on an unrelated civil matter, the state prosecutor who tried Zack."). Fed.R.Crim.Pro. 44(c) ("Whenever two or more defendants have been jointly charged . . . and are represented by retained or appointed counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."), construed in *Ross v. Heyne*, 638 F.2d at 983 ("[t]he Supreme Court's proposal of this rule indicates an recognition that the potential constitutional problems attendant to multiple representation are present when different attorneys from the same legal partnership represent codefendants with conflicting interests."); ABA Code of Professional Responsibility DR 5-105(D). Further, the Supreme Court of Georgia, exercising its supervisory rule over the bar, has adopted a mandatory rule to death penalty cases that co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 264 Ga. 230, 443 S.E.2d 193 (1994). This rule applies with equal force to representation by a firm's attorneys or by members of the same law firm. *Id.* at 193 n. 7.

6. *See Cuyler v. Sullivan*, 446 U.S. at 110, 100 S.Ct. at 1717 ("[a] possible conflict of interest in . . . cases [other] instances of multiple representation"); *United States v. Rhodes*, 779 F.2d 1571, 1574 (11th Cir.1986).

7. [illegible]

8. At the federal habeas hearing, Leaphart testified that he had not, at any time during his representation of Burger, discussed with the district attorney the possibility of Burger's testifying against Stevens in return for a lesser sentence. THE at 33-35. When further questioned about plea negotiations on Burger's case, Leaphart testified that "it had crossed my mind . . . but that during the [trial] the district attorney refused to discuss it to any level." THE at 57 (emphasis supplied). From this testimony it appears that plea negotiations were [illegible] the district attorney's refusal to plea bargain is noticeable in the record.

culpable party, although the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(3) (1982), formerly Ga.Code Ann. § 27-2537(c)(3) (1933).

Once an actual conflict of interest is shown, without further inquiry, prejudice to the defendant is presumed. *Westbrook v. Zant*, 704 F.2d 1487, 1499 (11th Cir. 1983). "It is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances, the error cannot be considered harmless." *Baty v. Balkcom*, 661 F.2d at 395 (*quoting Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981)). The rationale for dispensing with the requirement of a showing of prejudice in conflict of interest cases "becomes apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel performance, in a case marking divided loyalties, from an examination of the transcript alone." *Johnson v. Hopper*, 639 F.2d 256, 259 (5th Cir. Unit B 1981). The degree to which counsel's strategic decisions and performance throughout the course of his representation are affected by an actual conflict of interest subtly permeate the whole of the defense and may not be manifested in his conduct at trial alone. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be inclined to direct the order of his defense in order to placate his other client. The fact that a particular lawyer may actually resist the temptation is of no concern." *Zant v. Blackmon*, 705 F.2d at 1467.

In light of this precedent it is clear that the presumption of prejudice arising from an actual conflict of interest cannot be overcome by evidence that counsel did, in fact, vigorously pursue one client's defense to the detriment of the other at trial. Although the factual content of the extraordinary circumstances in which the error of representing actually conflicting interests is considered harmless has not been delineated by this Court, it is apparent that a showing of no adverse effect upon counsel's performance at trial or no impairment of his client's defense does not constitute such a circumstance.

Thus, accepting the district court's findings, those findings having been adopted by the majority in this case, that Leuhart "in no way tailored his strategy toward protecting Stevens" at Burger's trial, and that the trial record "shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime," the presumption of prejudice from the actual conflict of interest between Burger and Stevens remains. Further, the actual conflict of interest between Stevens and Burger was not limited to Burger's trial, but permeated the entire course of Burger's state court proceedings. Once Burger established that an actual conflict of interest was present, whether at pretrial plea negotiations, trial or on appeal, and that he counsel actively represented both subjects, his claim of ineffective assistance of counsel was complete.

I turn now to Burger's claim that he was denied the effective assistance of counsel because he counsel failed to present any evidence in mitigation or otherwise, at either of his two sentencing proceedings. In *Blake v. Zant*, 695 F.2d 363, 367 (11th Cir. 1983), the court rejected a claim of failure to present any mitigating evidence at the sentencing proceeding in addition to that presented at the guilt phase of the trial constituted per se ineffective assistance of counsel. Although, unlike Stanley's attorney, Burger's attorney did not present any evidence during either the guilt or two sentencing phases, it is not necessary to articulate a per se rule of ineffectiveness in this case as "application of general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding," *id.*, demonstrates the ineffectiveness of Burger's counsel.

Counsel's duty of effective representation continues into the sentencing phase of his client's trial. *King v. Strickland*, 714 F.2d 1481, at 1491 (11th Cir.1983).

> The sentencing phase of any case regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceedings can be performed." ABA Standard on Criminal Justice, Sentencing Alternatives and Procedures § 5.2(c). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. *Stanley v. Zant*, 697 F.2d at 963.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc court), delineated the content of the duty to investigate:

> A lawyer cannot without the benefit of a reasonable substantial investigation into [a] plausible line of defense, even one based upon counsel's professional assumption regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions counsel need not investigate lines of defense that he has chosen not to employ at trial.
>
> . . . . . .
>
> In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable. *Id.* at 1255, 1256 (footnotes omitted).

"An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril." *Stanley v. Zant*, 697 F.2d at 966. Finally, once a showing of ineffective assistance of counsel due to counsel's failure to investigate has been made, the second prong of *Washington v. Strickland* requires that prejudice from the error be demonstrated. *Id.* at 1256.

The district court found that Leuhart's investigation into available mitigating evidence consisted solely of conversations with Burger's mother. Although it is unclear what the content of these conversations was relating to mitigating evidence concerning Burger's background outside of Wilcox County, Georgia, and the identity of possible character witnesses, who could be, the district court concluded that Leuhart's efforts "adequate if hardly ideal investigation," and that he "investigated options to

meet at least minimal professional standards." Clearly by no stretch of the imagination could Leaphart's investigation be characterized as reasonably substantial. Since Leaphart failed to conduct a reasonably substantial investigation into available mitigating evidence, in order to be effective his choice not to investigate must have been a reasonable strategic decision based upon reasonable assumptions. Three reasonable assumptions on which Leaphart's strategy not to substantially investigate available mitigating evidence have been proffered: 1) that Leaphart's theory of defense, or strategy, was to make the state prove its case, 2) that, if mitigating evidence had been offered at Burger's sentencing proceedings, Leaphart would have lost the right to opening and closing argument, and 3) that Leaphart chose to rely in closing on the argument that Burger had never been in trouble before, an argument which would have been undercut by an investigation into Burger's background. None of these strategies, and the assumptions on which they are based, withstand scrutiny for reasonableness.

Leaphart testified concerning his strategy or theory of defense in Burger's case:

> Well, of course, my theory of defense was of course trying to make the District Attorney prove his case. And my theory of defense was to—well, that in effect, in essence what it was. And use whatever rules of evidence and to prevent him from doing so.[9]

And, anecdotally concerning the second trial solely on the issue of penalty, Leaphart again testified that he "[f]elt that case should have been tried on the facts and make the District Attorney—I can make him, use whatever rules of evidence to exclude those harmful facts."[10] The law provides that the state must prove its case, whether defense counsel is present or not. Relying on the state's case is not a "strategy" for the defense, but instead reflects an abandonment of counsel's obligation to develop a case for his client. This proffered strategy is tantamount to no strategy at all, and reliance on such a strategy, especially in the context of a capital sentencing proceeding, as an alternative to substantially investigating available mitigating evidence is patently unreasonable.

Second, Leaphart testified that he made a decision not to offer any evidence in mitigation in order to preserve his right to opening and closing arguments. Again, the basic assumption on which this strategy was based is patently unreasonable. O.C.G.A. § 17-10-2(a) & (c) (1982), formerly Ga.Code Ann. § 27-2502(a) & (c) (1953), provide for the conduct of sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects the division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and defense closed final arguments to the jury. Leaphart simply failed to inform himself of his Georgia criminal procedure in sentencing proceedings. *Cf. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). Such strategy based on such a false assumption is unreasonable. The district court clearly erred in concluding otherwise.

[9] [illegible]

[10] [illegible]

The district court found that Leaphart's failure to substantially investigate available mitigating evidence was based on a strategic choice to rely in closing argument on the "major argument" in Burger's behalf that he had no prior record of violent crime and had never been in trouble before. As it relates to Burger's second sentencing proceeding, this finding is contradicted by the record: at no point in his closing argument did Leaphart mention the lack of evidence that Burger had a record or had been in trouble before. Instead, Leaphart's closing argument at the second sentencing proceeding argued Burger's lack of culpability as compared to Stevens', and concluded with the plea for mercy. Neither argument would have been undercut by the presentation of humanizing evidence concerning Burger's background.

In conclusion, Leaphart's decision not to substantially investigate available mitigating evidence was not a reasonable strategic choice, and thus his failure to investigate constituted ineffective assistance of counsel.

The inquiry does not end with a finding of ineffective assistance. Burger may prevail only if he shows both a denial of effective assistance and actual prejudice to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258. Under any standard, in the case presented to appointed *See Douglas v. Wainwright*, 714 F.2d 1532 at 1536–38 (11th Cir.1983).

At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Testimony revealed the evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. Both parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house, his mother sent him back to live with his father. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence. Burger's stepfather involved him in drugs and alcohol when he was eleven years old. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. Burger was taken in by a neighbor, as he had nowhere else to go. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.

It is absolutely astounding to me that none of the evidence was ever presented to Burger's jury. The district court found that although the affidavits of the character witnesses supplied by Burger at the hearing do "contain references to a difficult childhood which might have created some sympathy for Mr. Burger," they also contained references to drug abuse, juvenile probation and violence. However, the thrust of the character testimony offered by Burger was not what Leaphart received without investigation: that Burger was a good boy and went to church, but that Burger's personality and motivation could be explained by his history and setting

childhood. Although this is precisely the kind of humanizing evidence that "may make a critical difference, especially in a capital case," Leaphart failed to make a substantial investigation into its use. *Stanley v. Zant*, 697 F.2d at 969. Leaphart testified that "[I] did not have any knowledge of any witnesses that—potential witnesses that I thought would have benefited him. Had I known or had knowledge of any, I would—certainly would have used them." [11] The prejudice to Burger from counsel's failure to substantially investigate available mitigating evidence and present it at either of his capital sentencing proceedings lies in the alternative chosen by counsel: to present no evidence at all. On the basis of the state court record, two sentencing juries recommended the death penalty.

Failure to present this substantial, available mitigating evidence meets the prejudice prong of *Washington v. Strickland*, 693 F.2d at 1263-62, showing that "the petitioner suffered actual and substantial detriment to the conduct of his defence."

For these reasons, I would REVERSE the district court's finding that Burger was afforded the effective assistance of counsel during his state court proceedings and REMAND this case to the state court for a trial with Burger being represented by conflict-free and competent counsel.

11. THC at 44.